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THE
ARCHITECT'S
LEGAL HANDBOOK

BY
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BARRISTERS-AT-LAW

*DEDICATED, BY PERMISSION, TO
THE ROYAL INSTITUTE OF BRITISH ARCHITECTS*

FOURTH EDITION

LONDON
KEGAN PAUL, TRENCH, & CO , 1 PATERNOSTER SQUARE
1889

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DEDICATED

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TO

THE ROYAL INSTITUTE

OF

BRITISH ARCHITECTS

PREFACE.

WHEN this little work was first projected, it was designed primarily for the use of Architects, and was intended to acquaint them with the legal principles applicable to those questions which would be likely to occur in the course of their practice. And as, in order to do this effectually, it would be necessary to examine those questions from the builder's point of view, and from that of the building-owner, it was hoped that the book might be of use to them. We also thought that a collection of the cases which had been decided upon points connected with building contracts might be of service to members of the legal profession. We found it by no means easy to accomplish our object, which was to say sufficient to render legal propositions intelligible to lay readers, and at the same time to avoid as far as possible the use of technicalities ; and we confess that we

felt much anxiety as to how far our end had been obtained. The reception, however, which our work has met with at the hands of those for whom it was intended has relieved this anxiety, and has induced us to present this edition with a degree of hope which would hardly have been reasonable when the work was first introduced.

We are indebted to Mr. George Trollope for some valuable suggestions, and it is with his permission that we publish the form of contract appearing on p. 224.

As it seemed to us that the decisions in the cases of *Laidlaw v. The Hastings Pier Co.* and *Lord Bateman v. Thompson* (which have not hitherto been reported) were important, and might be useful, we have given, in the Appendix, reports of those cases, which we have taken from the shorthand-writer's notes. We have also given in the Appendix a report, taken from the *Times*, of the case of *Ebdy v. M'Gowan*—the decision on the question of the architect's right to retain plans.

In the Appendix will also be found the Metropolitan Building Act Amendment Act 1878, and the bye-laws made under it.

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LIST OF ABBREVIATIONS USED IN THIS WORK.

ABBREVIATIONS.	NAMES OF WORKS, ETC.
A. and E. ...	Adolphus and Ellis's Reports, King's Bench.
App. Ca. ...	Appeal Cases in the House of Lords, or Privy Council.
B and A. ...	Barnewall and Alderson's Reports, King's Bench.
B. and Ad. ...	Barnewall and Adolphus's Reports, King's Bench.
B. and C. ...	Barnewall and Cresswell's Reports, King's Bench.
B and S. ...	Best and Smith's Reports, Queen's Bench.
Bing. ...	Bingham's Reports, Common Pleas
Bing. N. C. ...	Bingham's New Cases, Common Pleas.
Bulst. ...	Bulstrode's Reports.
Burr. ...	Burrow's Reports, King's Bench.
C. B. ...	Common Bench Reports, Common Pleas.
C. B. (N. S.) ...	Common Bench Reports, New Series, Common Pleas.
C. and J. ...	Crompton and Jervis's Reports, Exchequer.
C. and M. ...	Crompton and Meeson's Reports, Exchequer.
C and P. ...	Carrington and Payne's Nisi Prius Reports.
Camp. ...	Campbell's Nisi Prius Reports.
Ch D. ...	Chancery Division.
E and B ..	Ellis and Blackburn's Reports, Queen's Bench
E B. and E. ..	Ellis, Blackburn, and Ellis's Reports, Queen's Bench
E and E. ...	Ellis and Ellis's Reports, Queen's Bench.
Exch ...	Exchequer Reports
Ex. D ...	Exchequer Division.
F. and F. ...	Foster and Finlason's Nisi Prius Reports.
Giff. ...	Giffard's Chancery Reports.
H and C. ...	Hurlstone and Coltman's Reports, Exchequer.
H and N. ...	Hurlstone and Norman's Reports, Exchequer.
L. J., Ch. ...	Law Journal, Chancery Reports.
L J , C. P. ...	Law Journal, Common Pleas Reports.
L. J , Ex. ..	Law Journal, Exchequer Reports.
L. J., Q. B ...	Law Journal, Queen's Bench Reports.
L. T. ...	Law Times Reports.
L. R , C. P. ...	Law Reports, Common Pleas Cases.
L. R , Eq	Law Reports, Equity Cases
L. R , Ex. ..	Law Reports, Exchequer Cases.
L R , Q. B ...	Law Reports, Queen's Bench Cases.
M. and W ...	Meeson and Welsby's Reports, Exchequer.
Mac. and G. ...	Macnaughton and Gordon's Chancery Reports.
Phill. ..	Phillips's Chancery Reports.
Q B. .	Queen's Bench Reports.
Q B. D. ...	Queen's Bench Division
Salk ...	Salkeld's Reports All the Common Law Courts.
Smith's L. C. ...	Smith's Leading Cases.
T. R. ...	Term Reports, King's Bench.

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Board, Hunt v. ...	1878	4 C.P.D., 48 ; 48 L J., C.P D., 207	12, 133	
Witney Union,				
Moon v	1837	3 Bing N C., 814	72	
Worthington v Hol-				
land	1866	L R., 1 Q.B., 63 ; 35 L.J., Q.B., 61 ..	81	
Wright v. Fairfield	1831	2 B and Ad , 727	101	
——, Hall v. ...	1858	E. B and E., 746 ; 27 L.J., Q B., 342	104, 109	
Young Coker v. ...	1860	2 F. and F., 98	73	

THE LAW RELATING TO BUILDING CONTRACTS.

CHAPTER I.

—INTRODUCTORY OBSERVATIONS. 2.—Definitions of 'contract' and 'tort.' 3.—A building contract. 4.—Duty of the Architect 5.—The retainer. 6.—When it must be in writing 7.—Remedy of Architect, if not employed, after having been retained. 8.—Measure of damages—Nominal. 9.—Substantial.

1.—PUT to your mind any conceivable case of legal enquiry, and if it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a *contract* or a *tort*,* that is a legal wrong of a character not criminal, yet in respect of which arises a claim for damages. This being so, and there being no cases of *tort*, pure and simple, peculiar to the profession for which this work is intended, our attention will be almost confined to the consideration of contracts, and a few instances which we shall meet with of torts arising out of contract.

2.—A contract is an agreement between two or more

* Smith's Law of Contracts.

persons to do or to abstain from doing some definite thing or things. Indeed, the words 'contract' and 'agreement' are interchangeable, for in law they mean the same thing ; but we shall use the word 'contract' throughout in speaking of that engagement which is entered into between an Architect and his employer or client.

A contract may be *express*, or it may be *implied*: that is to say—the terms of the agreement may be expressed at the time of making it, either in writing or by word of mouth, and this is termed an express contract ; or, on the other hand, the terms may not have been defined by the parties, but it is possible that they may have so acted that from their acts the law will imply an agreement. For instance, I agree to buy A's house for £1000, and say so in writing, also stating any other terms of the purchase. The contract is clearly *express*. I then direct an Architect to draw plans and take out quantities for additions to the house. He does it, there is then a contract *implied* on my part to pay the Architect a reasonable sum for his work.

In the first case the parties themselves define their obligations ; in the second they are defined by the law.

One other classification of contracts may be mentioned. An *executed* contract is one where all the consideration or equivalent-that-was-to-be, has been performed or paid.

A contract is said to be *executory* where one party performs and the other is trusted, or where neither performs but each trusts the other.

3.—Having thus, sufficiently for our purpose, classified and defined contracts, we propose to take the reader straight through A BUILDING CONTRACT, describing the different events of it in the chronological order in which they would most probably occur, and, where it may seem expedient to do so, stopping to consider contingencies liable to arise.

4.—It should first be observed that every person who adopts a learned profession undertakes to bring to the exercise of it proper qualifications and a *reasonable* degree of care and skill; and a party injured through a breach of this undertaking may maintain an action for the breach. Yet a professional man does not undertake to use the *highest possible* degree of skill; he does undertake in the practice of his profession to use a fair, reasonable, and competent degree of skill. And in any given case, involving a charge of negligence or unskilfulness, it will be for the jury to say whether the injury complained of really was occasioned by the want of such care and skill in the defendant.

5.—Having pointed out that, before commencing any undertaking, the law imposes on an Architect the duty that he should be duly qualified to practise his profession, and that moreover he is under a legal obligation to use a reasonable amount of care and skill in its practice, we will proceed to consider the first step in a Building Contract—namely, the Retainer of the Architect.

In cases where in legal phrase ‘the consideration for a contract is *executed*’ (that is to say, where the subject-matter of the contract has been performed, or the work has been done), to render the contract valid—to make it obligatory on the person to be charged, the consideration must have been founded on a previous request. For instance, an Architect may have drawn a set of plans for me, and yet I may be under no legal obligation to remunerate him. I may never have asked him to do so at all; or whatever negotiation may have taken place between us, I may not have gone so far as to prefer to him such a request as would in law justify him in charging upon me the responsibility of having employed him. Work may have been done, and he may suppose or allege he has done it for me,

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but I cannot be charged with it unless it has, in fact, been done by my orders, or I have, *by accepting the benefit of it*, given rise to a legal implication that I made an antecedent request. For a request may be implied as well as expressed. It is a maxim of law that 'a ratification has a retrospective effect, and is equivalent to a prior command.'^{*} From the adoption and enjoyment of the benefit of the work the law will *imply* a request, though there may not have been any previously expressed.

But of course the necessity for such an implication on the part of the law in order that a necessary element of a contract may not be wanting, does not exist when there has been a retainer. A retainer will in itself afford conclusive evidence of a request to perform all the services contained in it. The question now arises, What is a retainer? and what, if any, are its necessary formalities? A retainer is, in fact, simply a request in terms (such as we have just alluded to) made to an Architect or other professional man to hold himself engaged to the person who retains him. It may be a general retainer, afterwards to be more particularly defined, as, *e.g.*, 'I engage your services for some building-work,' or 'I engage your services for six months.' Any work subsequently performed under such a request would be chargeable to the person who made it. Or it might be a retainer for a specific purpose, as, *e.g.*, 'I wish you to draw plans for my house at W.,' or 'I desire you to superintend my alterations at B.' Work being done under this specific request, it would be sufficient evidence of a retainer. A money fee may or may not be an incident of the retainer, and, if it is, it may or may not be paid simultaneously with it. But a payment or promise of payment of

* Omnis ratihabitio retrotrahitur et mandato equiparatur.

a retaining fee would, of course, be the strongest confirmation of a retainer that could be adduced.

6.—As for the formalities of a retainer,—in one event, and in one event only, is it necessary that the retainer should be in writing, and that is when the services of the Architect are at the outset retained for a period extending beyond a year from the date of the retainer. In such a case an unwritten contract could not be legally enforced, since it would come within the Statute of Frauds.* which enacts ‘that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.’ To bring it however within this enactment, it must appear distinctly that the agreement is one which it is not intended shall be performed within a year. It must be a *time* engagement at the outset. For instance, if B were retained simply to erect a building, which possibly, though not probably might be completed within a year, even though it might not be completed for several years, the retainer need not be in writing. But if C were retained to superintend its erection for thirteen months, the retainer should be in writing. Or again, if on the 1st of January, the services of C were retained for a year, to commence on the 14th of January, this being an agreement which is not to be performed within the space of a year from the making thereof should be in writing.† Again, a retainer for

* 29 Car. II, cap. 3, sec. 4.

† *Bracegirdle v. Heald*, 1 B. and A., 722. *Leroux v. Brown*, 22 L. J., C. P., 1.

more than a year, though determinable within the year upon the happening of a given event, must be in writing.*

7.—It may be asked, if a man retains an Architect, and afterwards either abandons his undertaking or avails himself of another, has the Architect any remedy? The answer is, yes. If there be an actual retainer and acceptance of a retainer, amounting to a valid contract, either may hold the other to it, or maintain an action for any breach or failure in its performance. But then the matter must have passed beyond mere negotiation, for, in the words of Chief Justice Best, ‘till both parties are agreed either has a right to be off.’* The difficulty in such cases is to ascertain how far, in the course of negotiations, either or both parties may have committed themselves. An Architect, therefore, at the earliest possible moment in a negotiation, should get a valid retainer.

8.—A question which here naturally presents itself is one of cogent importance, but we should be exceeding our province were we to give it more than a passing notice. In case of a breach of retainer, what would be the measure of damages? And we will here remark that, before incurring the anxiety of a law-suit, a man should carefully consider this question and be thoroughly advised upon it; for he may rest well-assured that his anxiety will be compensated by *no more* than the sum to which in strict justice he is entitled. He should not (as it is to be feared many do) too readily countenance the hope that he was engaged in an undertaking which must have resulted in actual profit, for even should the verdict of

* *Dobson v. Collis*, 25 L J, Exch, 267; 1 H. and N., 81 (where the cases on the point are collected).

† *Routledge v Grant*, 4 Bing., 661.

a jury perchance appear to justify this hope for a time, he should bear in mind that their assessment will have to sustain the impartial scrutiny of the court above. We here use the term 'damages' to signify the pecuniary compensation to be awarded to the plaintiff for the injury he has sustained in consequence of the defendant's breach of contract. By the expression 'measure of damages' is meant the rule by which the jury ought to be guided in assessing the damages in any particular case. As remarked above, if there be a breach of an agreement, in which one has promised for a consideration to render certain services and the other has retained them, an action lies at the suit of the injured party. And even if he be not able to prove that he has sustained any appreciable loss, yet he will be entitled at any rate to *nominal* damages, for the law implies a loss from the bare breach of a contract.

9 —In cases where actual loss has been sustained, it will be for the jury to award such substantial damages as they may think the loss of the employment on the one hand, or of the services on the other has occasioned. For said Baron Parke, 'Where a party sustains a loss by breach of contract, he is so far as money can do it, to be placed in the same situation as if the contract had been performed.'* But while estimating his loss on this principle, the plaintiff should never lose sight of the long established rule, that the damage must not be too remote, but must be the natural and immediate result of the injury complained of. We content ourselves with thus mentioning the general rules applicable to the kind of cases at present under our consideration, for when we remember the observation in Smith's Leading Cases, that the application of these rules

* *Robinson v. Harman*, 1 Exch., 855.

to the varying circumstances of different cases is sometimes attended with great difficulty, it will be plain that on this point we have taken the reader as far as it is expedient for him to go.

An engineer's (or architect's) position, in relation to his employer, is confidential, and it is fraudulent for him, without the sanction of his employer, to enter into a sub-contract with the contractor, to carry out a part of the principal contract, and such conduct will entitle the employer to have the principal contract rescinded, and to refuse to proceed with it in any shape.*

* *The Panama and South Pacific Telegraph Co v. The India Rubber, Gutta Percha and Telegraph Works Co.*, L. R. 10, Ch , 515 ; 45 L J , Ch., 121.

CHAPTER II.

10 —REMARKS ON CONTRACTS—Specialty—Simple. 11 —Elements of a Simple Contract. 12.—The Request 13 —The Consideration. 14.—The Promise 15 —Contracts under Seal. 16 —Contracts by Corporations 17.—Covenants 18 —Contracts not assignable. 19.—Consequence of signing contracts hastily.

10.—BEFORE going on to consider the contract itself, we may briefly notice some of the legal requisites of a contract generally, confining our attention to those which are applicable to the particular class of contracts now under consideration. Contracts are divided into *specialty* contracts, and *simple* contracts.

Specialty Contracts are agreements under seal.

Simple Contracts are agreements by word of mouth ; or, in writing not under seal.

11.—The essential elements of every simple contract are the request, the consideration, and the promise.

12.—The request, as noticed before (sec. 5), must be either *express* or *implied*. If A has done certain work and seeks to recover payment for it from B, he must prove an express request from B that he should do the work ; or if when the work is finished, B adopts and enjoys the benefit of it, it will not be necessary for A to prove an express request from B, for the law will imply an antecedent request from his subsequent conduct.

13.—We said the second necessary ingredient of every simple contract is the *consideration*. A promise made without

a consideration is regarded as a *nudum pactum*, a *naked or void agreement*; damages for its breach will not be recoverable in a court of law, nor will its performance be decreed by a court of equity. For instance, if A promises B that, without any remuneration, he will prepare plans for him, and afterwards fails to fulfil his engagement, B has no redress, no matter how serious the consequences may have been to him, or how dishonourable and unjustifiable A's conduct may have been. But it may be asked—What does the law of England recognise as a consideration such as will support a simple contract? According to an authority on this question, the best and most practical answer is, 'Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon the person to whom it is made.'* But as it is possible that this abstract definition may not have made the matter perfectly intelligible to the non-professional reader, we will endeavour to illustrate what is meant by an example. Let us suppose that, in consideration that B, at the request of A, will prepare certain plans, A promises to pay him £500. B prepares the plans but cannot obtain the money, and is compelled to bring an action for the amount. Now, in order to entitle him to recover the £500, B must prove at the trial a consideration—in this case the preparation of the plans—moving from himself. And on the other hand, if B fails to prepare the plans and breaks his contract, in an action brought against him by A for loss occasioned thereby, it will be necessary for A to allege and prove a consideration moving from him—in this case the promise to pay the £500. In the words of Mr. Justice Patteson, 'consideration means something which is of some

value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant, but at all events it must be *moving from the plaintiff*.’*

The consideration may consist of money or anything of appreciable value which is to be bestowed upon, or conveyed to, one party by the other—in short, anything which may be a loss or detriment to one party, and a benefit to the other. And note that if the consideration is of *some* value, some benefit to one party, or some detriment to the other, the courts will not enter into any inquiry as to the *adequacy* of its value, except where the inadequacy is so gross as to afford evidence of fraud.†

14.—The third element essential for the validity of a simple contract is the *promise*. But this need not be expressed. For instance, if one man requests another to do certain work for him, which is accordingly done and adopted, the law will imply a promise on his part to pay for it, for the law will not presume that any man was employed to work for nothing.

15.—It is necessary to notice briefly some of the principles applicable to contracts under seal,—deeds, or as they are technically termed *specialty* contracts, and we shall confine ourselves to those principles which are of practical importance. We have seen that the element most essential to the validity of a simple contract, that which is indeed necessary for its very existence—for without it it is not a contract but a *nudum pactum*—is the consideration; the law will imply a request, or it will infer that a promise was given, but the consideration, which is the foundation of the contract,

* *Thomas v. Thomas*, 2 Q. B., 859.

† *Smith on Contracts*, p 138.

it will not imply. That must be alleged and proved. The most important distinction, then, between a simple contract and a contract under seal is, that the latter, the deed, requires no consideration to support it. For instance, suppose an agreement in writing, signed but not sealed, 'I, A. B. agree to pay C. D. £50,' or 'to do a particular thing,' or 'to abstain from doing a particular thing,' in each of these cases no action could be maintained for the breach of the agreement, unless it could be shown that it was founded upon a consideration. But if the formality were gone through of affixing a seal to any one of these agreements, and of A. B. placing his finger on the seal and saying, 'I deliver this as my act and deed,' there would be an agreement, for the breach of which an action could be supported without proof of any consideration whatever. This is the result of ancient legal fictions into which we need not here enter

Sealing and *delivery* are formalities essential for the due execution of a deed. It will take effect from the date of delivery, though that may differ from the date on which, on the face of it, it may purport to have been executed, for 'a deed has no operation until delivery.*' No act of delivery is positively necessary, it may be delivered by words but the act of delivery is sufficient.†

16.—To an Architect this species of contract is most important in its relation to the numerous public companies, Local Boards, and other public bodies.‡

A corporation can contract *only* under seal, for 'it is the affixing of the seal, and that only, which unites the several assents of the individuals composing it, and makes

* Mr. Justice Bayley in *Styles v Wardle*, 4 B. and A., 911.

† Broom's Commentaries, p. 269, and cases there cited.

‡ *Hunt v. Wimbledon Local Board*, 3 C. P. D., 208; 47 L. J., C. P. D., 540; on appeal, 4 C. P. D., 48; 48 L. J., C. P. D., 207.

one joint assent of the whole.’* There are some few exceptions to this rule, but with them we need not concern ourselves. It will suffice to say that though individual members may, by expressing their consent in writing or otherwise, render themselves personally liable, *nothing short of the seal will bind the corporation*. An Architect, therefore, interested in a contract with a corporation should be careful to see that there is affixed to it the corporate seal, if he desires to have the responsibility of the body corporate. But should he prefer to have the personal responsibility of the directors, or whoever the individuals composing the corporation may be, the contract should not be made under the seal of the corporation; it may be either a simple contract with the individuals in question or it may be under their private seals; but it must not be under the corporate seal, it must by its terms appear to be made with the individual director or member, or directors or members, and not with the corporation. In cases of this kind the practical question which has first to be considered is, which security is it most desirable to have, that of the corporation, or that of the individuals composing it? and when this is determined it only remains to take care that the contract is so framed as to accomplish the desired end.

17.—The stipulations or engagements which one party makes with another in a deed are termed *covenants*. A covenant has been defined to be ‘an agreement between two or more persons by an instrument in writing, sealed and delivered, whereby some of the parties engage, or one of them engages with the other or others of them, that some act hath or hath not already been done, or for the performance or non-performance of some specified duty,’—that some act shall be done, or shall not be done.† Perhaps a

* Smith’s Mercantile Law, p. 40.

† Platt on Covenants, p. 3. Broom’s Commentaries, p. 271.

specimen may make the matter plainer, and we will take, for the sake of simplicity, an engagement for the payment of a sum of money. A *bond* would run thus :—‘ Know, all men, by these presents that I, A.B., of ——— am held and firmly bound to C.D. of ——— in the penal sum of £ 1000 of lawful money of Great Britain to be paid to the said C.D. or to his certain attorney, executors, administrators, or assigns, for which payment to be well and truly made, I bind myself, my heirs, executors and administrators, and every of them firmly by these presents. Sealed with my seal. Dated this — day of —, A.D. —.’ A *covenant* is in this form :—‘ And the said A.B. doth hereby for himself, his heirs, executors, and administrators covenant with the said C.D., his executors and administrators to pay, &c., &c., &c.’ We have thus placed a bond and a covenant for the payment of money side by side, with the view of making the illustration more complete. In the bond, A.B. is the obligor or person bound, and C.D. is the obligee. In the covenant A.B. is the covenantor, and C.D. the covenantee. As we have seen, a covenant may be not merely for the payment of money, but to do, or to abstain from doing, a particular thing, so also bonds are frequently given not only for securing the payment of money, but to secure the performance or non-performance of many other acts.*

It must not be imagined that technical terms are necessary to create a covenant, or that the above or any other particular form is essential. Any words which clearly express the intention of the parties are sufficient. Mr. Justice Maule, in delivering the judgment of the Court in *Rashleigh v. the South Eastern Railway Company*, says that it is understood law that any words are sufficient ‘which show

* Williams on Personal Property, p. 131.

an intention to be bound by the deed, to do or to omit that which is the subject of the covenant: any such words are sufficient, and some such words are necessary to make a covenant.'

18.—Contracts are in law personal property, and they belong to that class of personal property known as *choses in action*. A debt or other legal chose in action may now be assigned (Judicature Act, 1873, s. 25, ss. 6), and—provided that the assignment be absolute and in writing, and that notice of it in writing be given to the debtor or other person from whom the assignor would have been entitled to claim such debt or chose in action—it will be effectual in law (subject to all equities which would have been entitled to priority before the Act) to pass from the date of the notice, the legal right to such debt or chose in action, and all remedies for the same, and a power to give a good discharge without the concurrence of the assignor. Instalments under a building contract may be assigned, either when they are due or whilst they are accruing, and when due, an action may be brought to recover them by the assignee in his own name.* An Architect who has entered into a contract to furnish plans cannot assign that contract, though he may, as we have just seen, assign his beneficial interest. With regard to artists, authors, engineers, Architects, or any other persons possessing peculiar technical skill, the contract is personal, and a substitute, however able, and even if he could be proved to the satisfaction of a jury to be professionally superior to the person engaged, cannot, except with the assent of the employer, be substituted for the person employed.

19.—It is a good practical rule for every man to act upon, that no contract should be signed without a careful

* *Bruce v. Banister*, 3 Q. B. D., 569; 47 L. J. (Q. B.), 722. *Buck v. Robson*, 3 Q. B. D., 686.

examination of its contents, and a thorough acquaintance with the facts and the circumstances ; so that the contracting parties may be clearly informed as to what is contracted for and what is promised ; the conditions of performance ; the amount and nature of the work to be done ; and the sufficiency of the value to be paid for it. To impress such a rule on the attention of a man of business may at first sight seem to be unnecessary ; but anyone familiar with law practice knows how often it is neglected on either side in the hope of some advantage to be gained. But it may be said that no prudent man would put his name to a contract unless he was thoroughly aware of the nature of the undertaking he was entering into , and that the above rule indicates the precautions which every man of discretion would adopt. The reported cases show that the difficulties and differences in them have very often arisen, not from ignorance of the law, but from the mere neglect of the parties to inform themselves of the nature of the obligation to which they had bound themselves ; and that, not so much from the want of an acquaintance with the legal consequences of the stipulations, as from sheer ignorance of the stipulations themselves. As an instance of this we may refer to the case of *Kimberley v. Dick*.* In that case, Kimberley, a builder, signed a contract to build a mansion for the defendant. To accommodate Dick's agent, who brought him the contract to sign, and who was desirous of returning speedily to Ireland, Kimberley signed the contract in much haste — indeed, without allowing himself time to go through the plans and specifications with anything like accuracy. The result of this was that he undertook to complete for £13,600 a work which he afterwards discovered he could not finish for less than £25,000.

* 41 L. J., Ch., 38.

The Master of the Rolls on this point observed 'that if he did the whole thing in a hurry, he must take the consequences of his haste, however much that haste may have been occasioned by a desire on his part to suit the convenience of Mr. Dick, to enable his agent to return to Dublin on that day. If he thought fit to enter into such a contract, under such a state of circumstances and under such conditions, it is his affair and he must take the consequences.' And on this point, the bill praying for an account to be taken of the work which the plaintiff had done was, for the reasons stated, dismissed. An equal degree of caution should be observed in making a tender, for an unqualified acceptance of a tender will bind both parties. In *Lewis v Bress** it was decided that 'an intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated, merely for the purpose of expressing the agreement already arrived at in formal language.' In this case, after the acceptance of his tender, the defendant (a builder) discovered that he had made a mistake in it, and it being for a much less sum than it should have been, he withdrew it. The plaintiff afterwards employed other builders, who completed the work for a sum greatly exceeding that mentioned in the defendant's tender; and the Court held, upon the principle stated above, that the plaintiff was entitled to recover the difference, that the parties having gone beyond mere negotiation, neither could withdraw.

* *Lewis v. Bress*, 3 Q. B. D., 667.

CHAPTER III.

20 —PRELIMINARY DRAWINGS 21 —Meaning of the term 'preliminary drawings' 22 —Reasonable time—what. 23 —Contingent contract. 24 —What precaution should be adopted.

20.—ARCHITECTS are sometimes called upon to furnish preliminary plans and drawings. In ordinary public competitions, the terms on which such plans, &c., are furnished are prescribed by the advertisements, or by specification alluded to in the advertisements, and the Architects entering on the competition will be bound by them. They therefore require no further notice. But we propose to consider the case of a contract for the preparation of preliminary plans and drawings, the meaning of the term, the time allowed for their execution, and the rights and liabilities generally of the Architect in such a case. These points were discussed in the case of *Moffatt v. Dickson*.* In that case the committee of visitors for erecting a county lunatic asylum authorised their clerk to write to the plaintiff Mofiatt, and inform him 'that they were ready to agree to the sum of £437 10s. to be paid to him for his services in examining the site, preparing the requisite preliminary drawings for the approval of the committee, and all other drawings and documents required [by an Act of Parliament] to be submitted to the Commissioners in Lunacy and

* 22 L. J , C. P., 265

afterwards to the Secretary of State, &c., &c., &c.' The first set of drawings was sent in by Mr. Moffatt in April, 1848, but they were not approved of by the committee. He sent in a second set in April, 1849, but the committee rejected them also, and requested the plaintiff to send in by the 1st of June another set, with certain specified alterations, and at the same time informed him that if this was not done they should feel it to be their duty to lose no further time and to proceed no further with him in the business. A third set of plans was sent in, and considered by the committee in August, 1849, when it was resolved by the committee that they did not make such provision for the asylum as they could approve; they therefore rejected them, and determined to proceed no further with the plaintiff. On this Moffatt brought his action, and claimed the remuneration for preparing the preliminary drawings, with damages for his dismissal. The defendants pleaded that a reasonable time had elapsed, and that no drawings had been prepared except those which had been rejected by the committee. The Court were of opinion that the verdict ought to be entered for the defendants. They thought that a reasonable time had elapsed within which the plaintiff ought to have prepared the requisite preliminary drawings, and, it having been proved that all the drawings were rejected which had been prepared, they thought the plea was proved. Whether this plea was a legal answer to the declaration was discussed on a subsequent day. It was then contended that the committee had by their conduct deprived the plaintiff of the opportunity of earning the £437 10s., but the Court (Chief Justice Jervis, Mr. Justice Maule, and Mr. Justice Cresswell) held that this was not the case. The plaintiff entered into the contract with notice of the ordeal that his plans would have to pass

through. In fact they thought the meaning of the parties to the contract was that the plaintiff was to prepare such plans as the committee should approve of, and that if he did not they might dismiss him in a reasonable time. They thought that as the plaintiff had failed to supply in a reasonable time preliminary drawings 'for their approval,'—which meant to be approved of by them,—the committee were not under any obligation to allow him to proceed with the work.

21.—The meaning put by the Court on the term 'preliminary drawings on approval' will sufficiently appear from the abstract given above. According to Mr. Justice Creswell,* it means—to be approved of by the party for whom the plans are prepared. It will be seen that an agreement of this kind places the architect very much at the mercy of his employer, and should his anxiety to obtain the ultimate employment, or his faith in his own skill and experience and ability to suit the taste of his employer, or to meet the requisition of a number of officials induce him, notwithstanding this, to enter into such an agreement, he should do so with his eyes open to the possible consequences, remembering that he may have, as had the plaintiff in *Moffatt v. Dickson*, to prepare set after set of drawings without receiving any remuneration whatever. Indeed, should the employer not choose to put an end to the business, as was done in that case, we do not know of any rule of law which could prevent the employer's disapproving of set after set of plans for ever, should the Architect choose to submit them. And on consideration it cannot be said that there is any hardship in such a case, for though the results of such an agreement may be fraught with mis-

fortunes to the Architect, it may be replied that he entered into it well knowing the risk he was running, and it would be unjust to compel a man after any length of time or under any circumstances to accept or pay for plans he did not approve of, when he had contracted only to accept and pay for plans which he did approve of. One thing the Architect now has which the plaintiff in *Moffatt v. Dickson* had not, namely a precedent to warn him from undertaking a losing and costly lawsuit in such a case.

22 —It appears also, that when, in a contract to prepare preliminary drawings for approval, no particular time is mentioned within which the work is to be done, it is presumed that the parties intended 'a reasonable time.'

It may be asked, what is a *reasonable time*? It will be evident at a glance that it is impossible to give this question a definite answer, or to lay down any hard-and-fast rule which shall be applicable to all the varying circumstances and contingencies of different cases. But who is to judge and determine whether or not a reasonable time has elapsed? It is always for the jury. Nevertheless the finding of the jury will be subject at the option of either party to the review of the full court, and if in their opinion the finding of the jury is not reasonably supported by the evidence they may send down the issues of fact to be tried again.

23.—We have considered a case in which the services of the Architect were unremunerated through his having undertaken that his plans were to be paid for only if approved of by his employers, we will now take another case, in which no difficulty arose as to the sufficiency of the plans, but in which the services of the Architect went

unremunerated in consequence of his having agreed that he was only to be paid on a contingency, the happening of which was rendered impossible by the act of the executors of his employer. In the case of *Moffatt v. Laurie and another, Executors*,* it had been agreed that John Laurie being possessed of certain lands, the plaintiff, an Architect and surveyor (by the way, according to Mr. Justice Maule, the same gentleman who was plaintiff in *Moffatt v. Dickson*), should lay out the said land for building purposes; that he should plot down all belts, clumps, trees, &c, and carefully lay out all roads, approaches, &c, and in short make all the necessary surveys upon the following conditions.—That he should make no charge for any of the above services, but that in the event of the land being disposed of for building purposes he should be appointed Architect on Laurie's behalf, and that the parties building should pay him a certain percentage on the outlay, if they did not—as they might—retain and pay him as their own Architect. But that in the event of Laurie or his executors wishing to dispense with his services they should be at liberty to do so, on the understanding that he or they should remunerate him for his services in making the preparations. The plaintiff made the necessary surveys, &c. Laurie died. Laurie's executors dispensed with the plaintiff's services, and sold the property, thus putting it out of their power to dispose of the land for building purposes. The plaintiff thereupon claimed that he was entitled to remuneration for making the preparations, and brought his action against the executors of Laurie.

For the defendants it was contended that the event on which it was stipulated that the money should be paid

* *Moffatt v. Laurie*, 24 L. J., C. P., 56.

never took place. The point which pressed the court most on the plaintiff's behalf was whether the fact that the performance of the contract had been rendered impossible by the defendants themselves was not tantamount to a breach. But Chief Justice Jervis thought, and the other members of the court were of the same opinion, that there had been no undertaking on the part of Laurie that he or his executors would not put it out of their power to dispose of the land for other than building purposes. As to the remuneration, the court thought that the meaning of the agreement was that if the land was let for building purposes, and the services of any Architect other than the plaintiff were retained, he should be paid for making the surveys, &c., but that if the land was not so disposed of he was not to receive any remuneration whatever that, in fact, the services to be dispensed with were the continuing services of superintending the property as Architect

There can be but little doubt that had the undertaking resulted as he anticipated, it would have proved profitable to Mr Moffatt, as the sum claimed for making the preparations alone was £6000, and he may therefore have been willing to risk the contingency. Or it may be that at the time of entering into the agreement the thought of such a contingency happening was looked on by him as too remote to be worth guarding against. In either case he took the risk.

24.—But we have now to answer the question—What is the moral of the above case, what lesson does it inculcate, what danger does it warn us of, and how is that danger to be avoided in future in similar undertakings?

The moral we should say is that it is not advisable to speculate on professional chances. Its lesson is, that if a man chooses to do so, the law will not help him if he turns up a bad card. This case shows that when an Architect agrees

with a landowner simply that he will make the necessary preparations and surveys for laying out land for building purposes, and that he is to be paid for so doing only in the event of the land being disposed of for building, there is no undertaking on the part of the landowner that his executors will not put it out of their power to dispose of the land for other than building purposes. Nay, the case under consideration must be taken to go farther, and to decide that there is no undertaking on the part of the landowner that he himself will not put it out of his power to dispose of the land otherwise than for building. Mr. Justice Williams was distinct on this point, for he says, 'I think that even if the testator in his lifetime had changed his mind, and sold the land not for building purposes, the plaintiff would have had no ground of complaint at all.'

The difficulty could, however, be easily met, by simply inserting in the agreement a clause to the effect—that in consideration of the services to be rendered by the Architect in preparing the plans, &c., the landowner agrees that he will not put it out of his power to dispose of the land for building purposes, or that in any event the Architect should be paid for the work actually done.

It may be urged that there is a practical impediment in the way of adopting this precaution, namely, that landowners might object to thus fettering themselves. No doubt; but we are bound to point out that should any unfortunate consequences result from your not finding it practicable, or convenient, or politic, to avail yourself of that protection which is open to you, they must be attributed to the real or supposed exigencies of your position, and not to any defect in the law. The law is there ready to aid you, but circumstances may deter you from relying on its

assistance ; if then misfortune occurs, the cause of it will simply be the fact that you have not protected yourself thoroughly, that you have not put on the whole armour of the law.

CHAPTER IV.

25 —TAKING OUT THE QUANTITIES 26 —Meaning put by the Court on the expression, ' Bill of Quantities ' 27 —For whom the quantities are taken out 28 —Error in the Bill of Quantities. 29 —General rules as to Bills of Quantities

25 —WE have now considered the retainer ; and, having very briefly noticed some of the elements and attributes of contracts generally, we have discussed the case of a contract for preliminary drawings, and we have examined the case of a contingent contract ; but before considering the contract ultimately entered into, there is another preliminary to be considered, namely, *taking out the quantities*

Now although architects, surveyors, and builders doubtless are aware of, and certainly would be taken to be aware of, the usage of their business on this or any other point, it must be borne in mind that in the large majority of cases their employers are ignorant of the usage, and a court of law will not infer that the parties intended as the basis of their agreement a usage of which one party to the agreement was in ignorance. It would be well then, at all events

in contracts made with an employer who was not himself either an Architect, a surveyor, or a builder, and who consequently could not be taken to be aware of the usage of the business, to insert a clause stating by whom and for whom the quantities are to be taken out, and by whom they are to be paid for. Fortunately, this simple precaution was not adopted in the two cases which we shall presently discuss, or we should have lost the advantage which we may hope to derive from digesting them.

26 —First, then, what is meant by ‘taking out the quantities’? and what is a ‘bill of quantities’? It would be idle to answer this question if our motive in so doing were to give our professional readers information or instruction on a point so entirely within their own province; but it is important that they should be aware of the idea which courts of law have on those terms, and that they should see what definition the tribunals which have to adjust disputes in such matters have acted upon. In *Moon v. The Guardians of the Witney Union*,* the *quantities* are defined to be the calculations of the expenses of erecting a building. And in the case drawn up for the Exchequer Chamber in *Scrivener v. Pask*† a bill of quantities is thus described —A bill of quantities for work to be done in erecting a building professes to be a correct list of the quantities of work and materials required to be done and provided in the erection thereof. We do not mean to say that the point was actually decided in either of these cases, but the definition was one which the Court seemed satisfied with and allowed to pass unchallenged, and one which we believe concurs with the professional description of the term.

27.—Secondly, the questions by whom and for whom the

* 3 Bing , N. C., 814.

† L. R., 1 C. P., 715.

quantities are made out, and who usually pays for doing it, were disposed of in *Moon v. The Guardians of the Witney Union*. In that case the defendants employed Kempthorne, an Architect, to prepare the necessary plans and specifications for erecting a new workhouse. Kempthorne employed the plaintiff Moon to make out the quantities for the builders. He (the plaintiff) was informed, and all the builders tendering were informed, that the successful competitor would have to pay him. Before any tenders had been sent in the defendants refused to go on with the work, and as they declined to satisfy the plaintiff's claim for making out the quantities, he brought his action. The defence set up was that there was no contract subsisting between the plaintiff and the defendants—or, to speak technically, that there was no 'privity' between them.

Now, the law presumes that when a man authorises another to make a contract for him in a particular trade or business, he authorises him to make it according to the usage of that trade or business, and evidence of the usage may be given to explain the contract, and it will be taken to form part of the contract, and the same effect will be given to it, as if it had been in terms expressed in the contract. It must be noticed that we say the law *presumes* this, for if in the contract there are terms at variance with the usage, showing that the parties did not intend to contract according to the usage, the law will not presume anything contrary to the intention of the parties—that intention which is to be gathered from the contract itself—and in that case evidence of the usage will not be admissible. It is necessary to state this proposition to explain the case, and the case itself affords a good illustration of the proposition. The defendants instructed Kempthorne, the Architect, to prepare plans and specifications. Kempthorne,

in accordance with these instructions, prepared the plans, and in accordance with what was usual, and having no instructions to the contrary, he employed a surveyor, the plaintiff, to take out the quantities. At the trial several witnesses, competent to testify on such a subject, proved that this was the usage. They also proved that the usage was for the builder whose tender was accepted to pay the surveyor. But that the plaintiff should be thus remunerated was rendered impossible by the act of the defendants themselves in countermanding the request for tenders. The jury found that 'there was a usage in the trade for Architects and builders to have their quantities made out by surveyors.' The Court, approving of this verdict, and alluding to the maxim, *in contractu tacite insunt quæ sunt moris et consuetudinis*—(terms which are in accordance with and warranted by custom and usage, may in some cases be tacitly imported into contracts)—held that Kempthorne, as agent for the defendants, had authority to bind them in such a contract with the plaintiff. They considered that it was a conditional contract, 'a contract by which it was arranged that the expenses of making out the quantities should be paid for by the successful competitor, if any; but if by the act of the defendants there should be no competition, then that the work which was done by their authority should be paid for by them.' Remembering the questions which we are now considering—by whom and for whom are the quantities made out, and by whom are they to be paid for?—it will be seen that this is an important case; for it involved a consideration of the usage of the business, and a decision of the Court on this point was necessary to determine the question in issue, for it was only the incorporation of the usage into the contract which rendered the defendants liable upon it. But in order to prevent its importance being

overestimated and the scope of the decision being mistaken, we must repeat that the defendants would not have been liable had the contract contained terms at variance with the usage. Further, as remarked by Chief Justice Tindal, whose observation we above quoted, the contract was conditional. if a tender had been sent in and accepted then the successful contractor would have had to pay the surveyor for taking out the quantities.

28.—The case of *Scrivener v. Pask** was one where the builders accepted the bill of quantities and paid the Architect by whom it had been made out, but afterwards found it inaccurate, and suffering loss in consequence, sought to render the building-owner liable for the expenses they had been put to by reason of its inaccuracy. The plaintiffs were nonsuited, and the Court of Exchequer Chamber thought rightly nonsuited, and Mr Justice Blackburn remarked —‘To entitle the plaintiffs to recover they must make out three things—that Paice (who took out the quantities) was the defendant’s agent, that Paice was guilty of fraud or misrepresentation, and that the defendant knew of and sanctioned it. There is no evidence here of either of these things. If there has been misconduct on the part of Paice, the plaintiffs have their remedy against him.’ It is possible that the difficulty here arose from Paice’s acting in a double capacity, as Architect for the defendant and quantity-taker for the plaintiffs, for had there been a separate quantity-taker, *Moon v. The Guardians of the Witney Union* goes to show that the contract would have been between him and the successful tenderer, in this case Scrivener; and the contract being between the builder and the quantity-taker directly, and not as agent for the building-

* *Scrivener v. Pask*, L. R., 1 C. P., 715.

owner, it is difficult to see how the latter could be made liable. But, as we have said, Paice's acting in the double capacity was probably the cause of the complication.

29.—We will now briefly summarise the rules, to be deduced from these authorities, by which the transactions of the parties as to the quantities would be governed in the absence of any agreement to the contrary.

When an Architect is employed to prepare plans and specifications for a new building, he is impliedly authorised to contract, as agent for his employer, with a surveyor to take out the quantities, such being the usage.

On the contract thus made by the Architect the employer is liable.

But (the contract being conditional) if a tender be made and accepted, and the works proceeded with, the liability will shift, and the contract will then be taken to subsist between the builder and the surveyor.

In this case the surveyor is not the agent of the employer, or building-owner.

CHAPTER V.

30 —THE CONTRACT ULTIMATELY ENTERED INTO. **31.**—The contract ordinarily entered into need not be in writing —Rule as to evidence admissible to vary contract **32.**—The duty and rights of the Architect. **33** —Architect's authority **34** —When not clearly defined **35** —Rule of law when the terms of a contract are clearly expressed **36** —Instances of the extent of the Architect's authority.

30 —WE will now suppose the contract ultimately to have been agreed upon between the parties. The parties to the contract are, generally, the builder and building-owner, and they should specify in the instrument what ground of authority it is intended to vest in the Architect. Forms of contract are given in the Appendix. But the forms of building contracts are necessarily very various. They are modified by the peculiar circumstances of the time, or of the undertaking, or of the position of the parties. In the absence of legal advice, one rule may be laid down as common to all contracts—viz., to take care to express in definite and precise words every point of the agreement. They need not be legal words, they need not be technical words—though it should be remembered that the advantage of such words is that they have a commonly-received and accurately-measured meaning—but they should be precise, and express as clearly as possible the intentions of the parties. For, in looking at such a

contract, if it be in dispute, a court of law or equity will hold itself bound to ascertain and to give effect to the intention of the parties. And in endeavouring to arrive at this intention they will carefully examine and sift every phrase and word contained within the four corners of the contract if written—or if parol will narrowly scan the evidence to get at that intention.

31.—There is no rule of law which requires that a building contract should be in writing. Neither is there any rule of law which requires that the amount of authority which the Architect shall exercise in superintending the erection and completion of the works, the subject of the contract, should be in writing. But as practically, whether required by law or not, a building contract would be reduced into writing, it is not necessary to dwell on this point. As regards the Architect, a retainer to superintend the erection of works for more than a year from the date of the retainer, would come within the fifth clause of the fourth section of the Statute of Frauds, and should be in writing. If, however, whether required by law or not, the contract is reduced into writing, or evidenced by writing, remember that, as a general rule, *no oral evidence will be admissible to contradict, vary, or explain it.* And in the same way, as a general rule, if the contract be evidenced by a deed, or document under seal, nothing short of a writing under seal will be admissible to contradict, vary, or explain it.

We say, as a general rule, that oral evidence is not admissible to explain a written contract, for it may be apparent on the face of the instrument itself that it is not a complete contract, in which case oral evidence will be admissible to explain it;* but though this may

* Roscoe on Evidence, 12th Ed., p. 19.

amount to a qualification of the rule, it can hardly be regarded as an exception to it, for the expression 'contract' in the rule must be taken to mean a *complete* contract.

32.—We will suppose that the preliminary drawings have been approved of, that any contingency on which the contract depended has happened, that the bill of quantities has been made out, and that the final contract has been agreed to. What is now the Architect's duty, and what are his rights? And it will be desirable to consider, *pari passu*, the rights and duty of his employer, for the existence of one is dependent on that of the other, the duty of the Architect necessarily involves a right on the part of the employer to have that duty performed, and the rights of the Architect would be vain were it not the duty of his employer to discharge his liabilities. And it will be necessary to consider the duty and rights of the builder, and indeed to examine some cases more closely affecting him than either the Architect or building-owner. Though a building contract to which the Architect was a party would be so rare as to be a curiosity, and though there are therefore usually only two parties to the contract, there are three people affected by it.

33.—We have pointed out (*ante*, p. 3) the duty which is imposed by law on the Architect. The limits of his authority in the general superintendence of the works must depend mainly on the terms of the agreement between the builder and the building-owner. There is no case which decides what is implied by law when the contract is general, or not sufficiently distinct, or altogether silent on the point.

If an Architect were to undertake to superintend the erection of works, it is apprehended that a reasonable amount of attention would be implied,

and that if any loss were occasioned by any neglect on the part of the Architect he would be liable. And there being no decision which defines the limit of the Architect's authority in the general superintendence of the works in the absence of any express agreement, we apprehend that evidence of usage would be admissible, and that the usage would be imported into the contract.

34.—We may here take this opportunity of observing that if a man's duty arising out of a contract is not clearly defined in the agreement, and consequently has to be implied, and no legal authority can be found to assist him—if he can only ascertain what is reasonable, he will discover that which in the large majority of cases the law would enforce, and on which he may rely as a guide. We do not mean to say that a man can always tell by the light of nature what the law on a particular point may be, but we do say that in cases where a duty arising out of a contract, not being expressed in the agreement, has to be implied, it will be found that that which the law dictates is not more nor less than that which a prudent and considerate man would after careful reflection advise. And it would be indeed strange were this not so, particularly when we think of the words of Lord Coke, that 'the two pillars of the law are Reason and Authority.' And the order in which he places them should not pass unnoticed, for if you ascertain in a certain case what is reasonable you will then have an authority, a principle applicable to similar cases; and though, where such cases arise, to disregard your authority and hark back would be much like proving your ready-reckoner, still the basis of the authority is, after all, what is reasonable.

35.—If, however, the terms of a contract are clearly expressed, the law will not afford any relief on account of

the absurdity, the unreasonableness, or even the impossibility of the particular thing which is undertaken, and if a man unmistakably contracts to do that which is impossible, he must on default pay damages, provided there is no fraud in the matter, and that it is not what has been termed a 'catching bargain.'

36.—Having laid down these general principles we may notice parts of the agreements in two cases, in which the limits of the Architect's authority were extensive and its nature responsible.

In *Knight v. Burgess*,* the schedule to the agreement contained the following conditions.—'If the contractors shall from any cause not comply with the terms of this contract within three days after being requested to do so by the Architects, the Architects shall have full power to prevent their further execution of the works, and shall cause the same to be finished by other tradesmen, the cost of such finishing and all additional expenses incurred thereby to be deducted from the balance which may be due or become due upon the contract; and all materials delivered on the ground in such case to be considered the property of the employers.' And in *Ormes v. Beadel*,† the limits of the Architects' authority were equally extensive, and the exercise of it depended on their discretion. In that case the condition ran thus:—'That if the works do not proceed with such progress as the Architects may consider necessary, they shall be empowered to purchase such materials and employ such workmanship as they may consider necessary, and deduct the costs of the same from any monies due to the contractor on these works.' We are aware that in practice such an amount of authority is frequently vested in

* *Knight v. Burgess*, 33 L. J., Ch., 727.

† *Ormes v. Beadel*, 30 L. J., Ch., 1.

the Architect; but our purpose will be to ascertain the course which the courts have approved of, or expressed acquiescence in, rather than that which is usually adopted. Those for whom this work is intended are aware of the usual practice of the profession; how far that practice is in accordance with legal principles and authority, and what have been the opinions and decisions pronounced by the courts on the subject, it is our desire to discuss. We notice the above cases merely as instances, for we cannot say that the amount of authority with which the Architect was invested was in either case the point of the decision; but as the mode in which the Architect exercised his authority was an important fact in each case, had the learned judges who heard them—Vice-Chancellor Stuart the former, and Lord Chancellor Campbell the latter—felt dissatisfied either with its amount or with the manner in which it was used, they could hardly have failed to express their disapproval.

We will now proceed a step further, and examine a case in which the authority of the Architect was as extensive and his discretion as large as in the two instances given above, and where the manner in which the authority and discretion were exercised came directly under the consideration of the Court. We allude to the case of *Roberts v. The Bury Improvement Commissioners*.* The questions in that case arose on demurrer, but we will avoid as far as possible all technical expressions. By a contract between the plaintiff Roberts, a contractor, and the defendants, a burial board, the plaintiff undertook to construct certain works for the defendants by a certain time, subject to various conditions, by one of

* *Roberts v. The Bury Improvement Commissioners*, L. R., 5 C. P., 310; 39 L. J., C. P., 129.

which the Architect according to whose plans the works were to be executed had power to give further drawings and to order further works to be erected. By another of the conditions the Architect was empowered to grant an extension of time if by reason of any addition to the works, or for any other cause arising with the defendants, their Architect, or his clerk, or for want or deficiency of any orders or drawings, or for various other specified causes, the plaintiff should, in the opinion of the Architect, have been unduly delayed in the completion of his contract. And by another of such conditions it was provided that it should be lawful for the defendants, in case the plaintiff should fail in any part of his undertaking, or should not in the opinion and according to the determination of the Architect exercise due diligence and make such progress as would enable the works to be effectually completed at the time contracted for, to determine the contract and take possession of the works. The plaintiff sued the defendants for wrongfully refusing to permit him to complete the contract. The defendants justified their refusal under the last above-mentioned condition. The plaintiff replied that though there had been delay in the execution of the works, such delay was occasioned by the default of the defendants and their Architect in not supplying plans and drawings, and in setting out the lands and defining the roads and giving such particulars as would enable the plaintiff to commence the works. To this the defendants rejoined that in the opinion of their Architect this was not the cause of the delay, and consequently they were justified in determining the contract. They did not deny that there had been delay in supplying the plans, but they alleged that the plaintiff's failure to complete the works was not occasioned by the delay. Upon these facts the question

was, whether the defendants were justified in the course they had taken, or whether the plaintiff had any cause of action. The Court of Common Pleas held that the opinion of the Architect was, under the agreement, final, and that the defendants were justified in the course which they had taken, but the Court of Exchequer Chamber reversed this decision, and Mr. Justice Blackburn put it on this ground.* that 'the contractor from the nature of the works could not begin his work until the commissioners and their Architect had supplied plans and set out the land and given the necessary particulars, and, therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time, and if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract, for it is a principle very well established at common law that *no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself*'†

Our apology for the somewhat lengthy abstract we have given of this case is, that we believe that it will be found to throw light not only on the point which we are now particularly considering, but also to illustrate some of the remarks which we offered on the nature of implied conditions, when introducing the branch of our subject now under discussion. As we have in effect already explained, if a condition is *expressed*, no matter how unreasonable it

* L. R., 5 C. P., 325; 39 L. J., C. P., 136.

† Com. Dig, Condition L.

may be, the assenting parties are bound by it—the one may enforce it, the other must submit—but when a condition is left to be *implied*, the law will introduce only such a condition as is reasonable; and the man who seeks to import into a contract and asks the law to imply and enforce a condition which is hard will find that he has but a sorry chance, and that if he wishes to be exacting he must express his intention clearly, and obtain an unqualified assent thereto. Thus, in this case, if the commissioners had said to the builder that no delay of theirs in supplying plans should be any excuse for his not making due progress with the works, and he had assented to the stipulation, he would have had no cause of complaint for which he could have obtained relief in a court of law.

We see by this case, that where the limit of the Architect's authority is not strictly and exactly defined, but some condition has to be implied, the Court will not imply a condition which is harsh or unreasonable.

In *Jones v. St. John's College, Oxford*,* on the other hand, a condition to do certain work in an unreasonably short time, or to pay in default a fixed sum per day for liquidated damages, was expressed in language so clear and unmistakable that the Court had no option but to enforce it. In that case the builders undertook to erect and complete a building by a certain fixed day. And they agreed that—should any alterations, additions, deductions, or variations be ordered by the clerk of the works, they would duly execute and complete the works contracted for, with such alterations, &c., in the same manner and subject to the same conditions, stipulations, and provisions to all

* *Jones v. St. John's College, Oxford*, L. R., 6 Q. B., 115; 40 L. J., Q. B., 80.

intents and purposes as if such alterations, &c., had been comprised in the works of the contract, and that the period for completing all such alterations should not exceed the period limited for the completion of the contract, unless an extension of time was allowed.—Alterations were ordered, but no extension of time was allowed. The works were not completed till some time after the specified date, it being practically impossible to finish them within the time, yet when the plaintiffs, the builders, sued for monies due on the contract, and the question was, whether the defendants were entitled to set off the penalties—the Court was *clearly of opinion that the defendants were entitled to do so*. They observed that though it might be very unwise to enter into such a contract, there was no reason why the plaintiffs should not do so if they chose. There was nothing illegal in the contract, and the plaintiffs had bound themselves as clearly as it was possible for language to do it.

It will no doubt be recollected that at the time when this case was decided, November, 1870, it excited some astonishment in the profession and building trade; the cause for this astonishment being that, as such contracts are frequently entered into, contractors were surprised to find that a practice common amongst them was accompanied with so much risk. But though it appeared to be a very hard case, it seems impossible to impugn the soundness of the decision. As Mr. Justice Hannen said, ‘the intention was to rely on the judgment and fairness of the clerk of the works’, but the mere fact that a man has formed a mistaken estimate of the character of another, or that he has misplaced his confidence, is not sufficient to entitle him to relief from the consequences of his error in judgment.

Such a clause as that in *Roberts v. The Bury Commissioners*,

to determine the contract for want of due progress on the part of the contractors, can only be acted on within the time fixed for the completion of the works.*

When, by the contract, a notice to proceed is to be given before determining the contract, if the progress has been sluggish generally, a general notice is sufficient.†

To summarise this part of our subject, then, we see that if the parties so agree there is practically no limit to the authority with which the Architect may be invested ; that he may be endowed with a discretion the extent of which would depend only on the power of his employer ; that if the terms of the contract are clearly expressed the builder may be placed almost absolutely at his mercy ; but that if this be intended, in each and every case the conditions should be expressed in unmistakable language, for if anything is left to be implied by law, that only will be implied which is reasonable.

* *Walker v. The London and North-Western Railway Co.*, 1 C P D. 518, 45 L. J., C. P. D., 787

† *Pauling v. The Mayor of Dover*, 10 Ex 753 ; 24 L. J., Ex., 128.

CHAPTER VI.

37 —WORK TO BE DONE TO THE SATISFACTION OF THE EMPLOYER.

38 —To the satisfaction of a third party 39 —The certificate, what it is 40 —Need not be in writing, unless the contract provides that it shall be 41.—Not an award 42 —When work is to be paid for only on obtaining the certificate 43 —When the certificate is fraudulently withheld 44 —General rules of law as to obtaining and withholding the certificate

37 —IN some instances the responsibility of deciding upon the adequacy of a builder's work is shared between the Architect and the employer, in others it may be left by the agreement to the final approval of an umpire. In the former case it is possible that the agreement may be so worded that even if the Architect approves the work it is open to the employer or building-owner to refuse to accept it. In *Stadhard v. Lee and another** the plaintiff agreed to execute certain works for the defendants, to the entire satisfaction of the engineer and clerk of the works of the Metropolitan Board of Works, as well as to the satisfaction of the defendants or their agents; provided that if the works should not proceed as rapidly and satisfactorily as required by the defendants or their agent, they should have full power to take possession of the works, and set to work whatever number of men they might think necessary, and

* *Stadhard v. Lee and another*, 32 L. J., Q. B., 75.

the costs of the men so set to work should be deducted from whatever monies might be due to the plaintiff. To an action for work and labour brought by the contractor the defendants pleaded that the work had not proceeded so rapidly and satisfactorily as they and their agent required, and they had therefore acted on the proviso, claiming their right to deduct from the plaintiff's demand the costs so incurred. To this the plaintiff replied that the works did proceed as rapidly and satisfactorily as the defendants reasonably and properly could require, and that the defendants unreasonably, improperly, and capriciously required the work to proceed as alleged in the plea. On these facts Chief Justice Cockburn, delivering the judgment of the Court, said, 'Now, on carefully considering the contract between the parties, we are satisfied that the intention was, that the defendants if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute and unqualified power to put on additional hands and get the work done, and deduct the cost from the contract-price payable to the plaintiff. And therefore, if these terms had been ever so unreasonable we should have felt bound to give effect to them, and to hold that so long as the defendants were acting *bona fide*, under an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded and unreasonable, they were entitled to insist on the condition, and consequently that the replication, which only alleges that their dissatisfaction was unreasonable and capricious, but which stops short of alleging *mala fides* in the defendants in acting as is stated in the plea, is insufficient.' On the subject of work being done to the satisfaction of the employer, we have selected this authority, for this question was the whole point of the case, it was thoroughly discussed during the argu-

ment, and was made the subject of a considered judgment.*

It is necessary now to say but little on this branch of our subject, the completion of work to the satisfaction of the employer, since the abstract which we have given will have already done much to dispose of the matter. Each case must depend on its own facts and circumstances, and in stating the rule applicable to cases of this description we cannot do better than extract from the judgment above referred to the following passage — ‘Stipulations and conditions of this kind should, where the language of the contract admits of it, receive a reasonable construction, as it

* It is right that we should not leave unnoticed the case of *Parson v. Sexton* (4 C. B., 899), for to some extent it is cited as an authority the other way. There the plaintiff agreed to sell the defendant an engine and boiler and to set them up, it being provided that the defendant was not to pay the last instalment if he was dissatisfied with the work, by which was meant the work of erecting the engine, and not the engine itself. Chief Justice Wilde delivered the judgment of the Court, who thought that a question should have been left to the jury as to whether the work was such as ought reasonably to have satisfied the defendant; which question, according to *Stadhard v. Lee*, would have been immaterial. But if the case is carefully examined it will be seen that the point which mainly engaged the attention of the Court and counsel was whether the sale of the engine was the sale of a specific chattel, out and out, or was a sale with a warranty; the other point was hardly noticed in the argument, and the Court in pronouncing their opinion upon it assigned no reasons for holding as they did. In *Stadhard v. Lee*, however, the question of the defendant’s dissatisfaction was the all-absorbing topic of the case; and though the Court is not bound to assign reasons for its opinion, still, a decision one way, founded on sound and sufficient reasons, must be taken to have more weight than a decision the other way not supported by any reasons. The other authority most pressed on the Court in *Stadhard v. Lee* was the case of *Dallman v. King* (4 Bing., N. C., 105), but there Mr Justice Bosanquet points out that the approval of the defendant was not a condition precedent to the plaintiff’s obtaining payment.

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is to be intended, that the party in whose favour such a clause is inserted, meant to secure only what was reasonable and just. But we are equally clear, that where from the whole tenor of the agreement it appears that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties'

38.—We have now to examine the case of a contract to execute work to the satisfaction of a third party. And this will involve the consideration of the *Architect's certificate*—its form, its effect, the consequences of its being refused or withheld, and the contractor's remedy, should its being refused be owing to any fraud or neglect on the part of the Architect.

39.—And first, let us consider what the certificate is in the opinion of a court of law, for though our professional readers are perfectly cognisant of the ordinary attributes and effect of a certificate, it is well that they should be placed in a position to check their ideas by the views entertained by the Judges on the subject.

40.—There is no necessity that the certificate should be in writing unless the contract requires, in terms, that it should be. This point was decided in the case of *Roberts v. Watkins*.* The extent of this decision will be better understood if we give the exact words of the contract on which it turned: 'Provided the said Thomas Lavender shall before each payment certify that the works are carried out to his satisfaction.' At the trial, Chief Justice Erle directed the jury that in point of

* *Roberts v. Watkins*, 14 C. B. N. S., 592; 32 L. J., C. P., 291.

law, a certificate in writing from the Architect was not required by this contract, and that it was sufficient if he verbally certified his approval. This ruling was sustained by the Court. In the course of his judgment Mr. Justice Byles observed, 'It is plain that the usual meaning of "certify" does not require anything written.'

The mere expression of an approval of the builders' account is not, however, for the reason stated below, equivalent to a certificate. In *Morgan v. Birnie*,* the builder's account had been checked and approved of, but he had not actually obtained the Architect's certificate. It was argued that this approval of the account must be deemed an implied certificate, but to this Chief Justice Tindal (the rest of the Court concurring) said — 'It seems to me that the effect of a certificate would be altogether different, applying to the manner in which the work has been done, while the checking the account applies only to the propriety of the charges.'†

41.—Neither is the certificate an award. In the case of the *Northampton Gas-Light Co. v. Parnell*,‡ the contract provided that the engineer should assess the amount to be paid by the contractors upon default on their part to fulfil any of the covenants contained in the contract. As he had not to determine whether the covenants had

* *Morgan v. Birnie*, 9 Bing, 672

† The older case of *De Vill v. Arnold* (10 Price, 21) is sometimes cited as an authority to show what amounts to a certificate of approval, but what was there held to amount to a certificate of approval was held in *Morgan v. Birnie* to amount merely to a checking of the account, and as *Morgan v. Birnie* has been since repeatedly acted upon, and as far as we have been able to ascertain *De Vill v. Arnold* has not, we cannot cite that case as an authority on the point.

‡ *The Northampton Gas-Light Co. v. Parnell*, 15 C. B., 630; 24 L. J., C. P., 60.

been broken, but, when broken, what amount should be paid by the contractors for the breach, the Court held that the instrument specifying the amount to be paid by the contractors was a certificate and not an award.

42.—When a building is to be paid for, or an instalment considered due, on the employer receiving the Architect's certificate that he is satisfied with the work, it is a condition precedent to recovery by the contractors that such certificate should be given. [To explain the expression just made use of—condition precedent—we may say 'that a contract, whether by deed or parol, often contains stipulations on both sides of such a nature that the performance of some act by one of the parties must be considered as a *condition precedent* to the performance of some act by the other, so that a breach in the prior obligation will excuse a breach in the posterior.'*] In such a case, therefore, without the Architect's certificate, the contractor's hands are tied. The first reported case on this subject is *Morgan v. Birnie*.† The decision there arrived at has been constantly followed, though repeated attempts have been made to obtain from a court of law, in the absence of the Architect's certificate, a 'measure-and-value price,' or from a court of equity a decree for an account ‡

Indeed, though the matter is one of extreme importance, the rule may be stated very shortly; *if it is agreed that payments to be made to a contractor shall only be considered due, provided the certificate of the Architect should first be*

* Ste. Com., 4th Ed., Vol. II, p. 63.

† *Morgan v. Birnie*, 9 Bing, 672.

‡ *Scott v. Liverpool Corporation*, 1 Giff., 216; 27 L. J., Ch, 641; and on appeal 3 De Gex and J, 334, 28 L. J., Ch, 230. *De Worms v. Mellor*, L. R. 16, Eq, 554. *Sharpe v. San Paulo Railway Co.*, L. R. 8, Ch., 597.

obtained, absence of the certificate is an answer to an action at law, or to a bill in equity.

43.—Even if the certificate should be fraudulently withheld, the absence of it may affect the form in which the action should be brought. In *Milner v. Field** the builder brought his action in the ordinary form for ‘work and labour,’ and proposed to show that although the work was done in every respect correctly, the certificate was fraudulently, and in collusion with the defendant, withheld; this evidence was, however, rejected, and the plaintiff was nonsuited. The effect of the judgment of the Court, refusing a rule to set aside the non-suit, must be taken to be, that where by the contract itself the certificate of an Architect is made a condition precedent to the right to payment, even if it is withheld through fraud, that is only the subject of a special action. Still it must not be imagined that the contractor is left quite at the mercy of the employer and his Architect, or that he has no remedy at law in the event of their misconduct. He has a remedy against the Architect,† if he can prove his fraud, and against the building-owner if he can prove his collusion with the Architect‡ In *Milner v. Field* the form of the pleadings prevented the plaintiff’s going into the question of fraud, but in *Batterbury v. Vyse* the declaration set out the contract, and it was then averred that the work was done to the satisfaction of the defendant’s Architect, but that the Architect unfairly and improperly

* *Milner v. Field*, 5 Exch., 829; 20 L. J., Ex., 68.

† *Ludbrook v. Barrett*, 46 L. J., C. P. D., 798.

‡ *Batterbury v. Vyse*, 2 H. and C., 32 L. J., Ex., 177

And see *Clarke v. Watson*, 18 C. B., N. S., 278; 34 L. J., C. P., 148, when a declaration which omitted the charges of ‘collusion’ and ‘procurement,’ was held bad on demurrer.

And see also, *Macintosh v. Great Western Railway Company*, 2 Mac. and G., 74, 19 L. J., Ch., 374, when a demurrer to a bill alleging collusion between employer and surveyor was overruled.

refused to certify in collusion with and by procurement of the defendant ; and the Court held that this disclosed a good cause of action. The contractor, however, we may mention, is not confined to his remedy at law, for in *Scott v Liverpool (Corporation)*, Vice-Chancellor Stuart remarks (27 L J., Ch., 648), 'if the evidence had established a case of gross misconduct on the part of the engineer, and of wilful neglect or refusal, or absolute incapacity in him to perform his duties, the case might have been brought within the jurisdiction of this Court upon that ground.'

We have hitherto treated only of the effect of the certificate and its conclusiveness on the builder. The employer is, however, equally bound by it. In *Lord Bateman v. Thompson* * the employer was put to great expense in reinstating work which had been improperly and unsubstantially done, although the builder had agreed that his work should be proper and substantial. It was, however, held that the Architect's certificate was conclusive upon him, and that he was not entitled to any compensation. And in *Laidlaw v. The Hastings Pier Company* † the engineer certified for extras which had never been supplied, and for work which had not been done. The Court, however, decided that the defendants were bound by his certificate.

44. Pausing here to take a glance at the topic we have just been discussing, and to sum up the obligations and duties imposed on the parties by the law, we may observe that when the Architect is to testify his satisfaction by certifying, nothing short of proof of this will be of any avail to the contractor : the work may be well and correctly done, the employer may be perfectly contented with the manner of its execution, it may even be completed to the satisfaction of

* *Lord Bateman v. Thompson*, reported post, p. 259.

† *Laidlaw v. The Hastings Pier Company*, reported post, p. 238.

the Architect, but nevertheless, unless such satisfaction be evidenced by the production or proof of the certificate, all attempts on the part of the contractor to recover any consideration in a court of justice, must, in the absence of impropriety on the part of the Architect, be fruitless. But though the Architect is the sole arbiter of the mode in which the contractor has acquitted himself in the performance of the contract, though on this point the parties are bound by his decision, and must submit to it without any appeal, and though he may be invested with a wide discretion and with considerable authority, his power is not absolute; he is not a despot but a judge, and as such the law ordains that he should be capable, that he should deal fairly between the parties, that he should not be negligent of his duties, and that he should not be guilty of misconduct or fraud in administering the power with which he is entrusted, and should the contractor succeed in making out that the certificate is withheld by the Architect in consequence of any or either of these delinquencies he will be entitled to the assistance of the Court.

Our remarks have hitherto been confined to the final certificate. The 'progress certificates' are merely statements of the value of work and materials done and supplied, they are made from time to time by the Architect to regulate the amount which the employer may advance with safety. They are altogether provisional, and subject to adjustment and re-adjustment at the end of the contract.*

* *The Tharsis Sulphur and Copper Company, v. M'Elroy*, 3 App. Ca. 1040.

CHAPTER VII.

45 —THE DUTIES AND LIABILITIES OF AN EMPLOYER. 46 —Is he bound to employ the Architect, though the work cannot be completed for the sum named in the estimates? 47 —Liability of building-owner for interference with his neighbour's rights caused by the erection of the building.

45.—THE examination of the duties and liabilities of the Architect has necessarily involved a partial consideration of the position of the employer, and has incidentally brought under our notice some points which we should otherwise have reviewed when examining particularly his legal situation. We now propose to enquire into some of these matters which we have not yet dwelt upon, to discuss the rights and liabilities of the employer, and to point out how he may be affected by the contract.

46.—And, in the first place, having accepted his plans, is the building-owner bound to employ the Architect, though he may find it impossible to complete the works without exceeding the estimates which he (the Architect) has given him? This question was raised, but, unfortunately, not disposed of, in the case of *Nelson v. Spooner*.* That was an action brought by an Architect whose plans after having been accepted were rejected on the ground that the work could not be done for the amount of his estimates. Chief Justice Cockburn left it to the jury to say—(1) Whether it was an

* *Nelson v. Spooner*, 2 F. and F. 613. See also, on this point, *Money Penny v. Hartland*, 1 C. and P., 352; 2 C. and P., 378.

express condition that the works should be capable of being completed for the estimated sum. If not, then (2) Whether there is an implied condition in such cases that the work should be capable of being done for a sum reasonably near the estimated sum? And if so, (3) Whether the plaintiff's estimate was so reasonably near that the defendants ought to have employed him? We have not, however, even the finding of the jury in the case, for being unable to agree they were discharged. As a matter of fact the Architect's estimate was £1545, and the average of the eleven tenders sent in was £2321.

Although, no doubt, it would have been more satisfactory to have had the finding of the jury and the opinion of the Court on the main point—namely, whether there is an implied condition in such cases that the work shall be capable of being done for a sum reasonably near the estimated sum—still it is important to observe how the case was left to the jury. We apprehend that in any similar case, in the absence of an express condition, the judge will leave to the jury the second question; and an Architect in leaving a contract vague or inexplicit on this point must clearly anticipate that, should a difficulty arise, it will be left to the jury, and not be assumed by the judge, to determine whether in giving an estimate he has bound himself to a contract that the cost shall come within a reasonable approximation to his estimate. This is, however, eminently a case for the determination of which sound common sense is requisite rather than profundity of learning. The question in such a case is really—What is reasonable? and as this must always be a question of fact depending on the special circumstances of each particular case, it is impossible to lay down any general rule which would be applicable to all cases.

If an estimate were furnished stating that certain works could be erected for £1000, and it was afterwards discovered that they could not be completed for less than £1010, it would be impossible to contend that the work was not capable of being done for a sum reasonably near to the estimated sum, and if the work could not be completed for less than £2000, it is difficult to see how one could argue that the cost was reasonably near the estimate. The difficulty arises when cases come near to the line between what is and what is not reasonable. To use Baron Bramwell's oft-quoted expression—'We know that at noonday it is light, and that at midnight it is dark; but it is difficult to say exactly when daylight ceases and night begins.' If the parties choose to make their own law, so to speak, and to agree that if the cost exceeds the estimate by one shilling the employer shall be at liberty to treat the promise as void and to reject the plans of the Architect, they may do so—that is to say, there is no law to prevent their doing so, but if such a condition is assented to it will be useless for either party afterwards to ask the Court to assist them, and to impose reasonable terms on the other side, or in short to do anything but enforce the conditions to which they have assented.

And we may take this opportunity of observing generally, that when one party intends to insist particularly on some one element of the contract, and to hold the other strictly to it, he should make known his intention at the time of entering into the contract. For instance, if *time* should be a matter of importance, and it is desired to have the subject-matter of the contract completed by a certain date—if, in legal phrase, it is intended that time should be of the essence of the contract—a stipulation specifying this should be introduced, for the law will not otherwise allow a man to insist peremptorily upon it.

47.—The building-owner is ordinarily liable for any inter-

ference which the erection of the buildings may cause with the rights to which his neighbours may be entitled, such as rights to light, air, water, rights of way, and other similar rights. These rights are technically termed 'easements.'

Although Architects, in common with all other men, are so conclusively presumed to know the law that ignorance of its existence will afford no excuse, this presumption, extensive and universal though it is, does not assume on the part of the Architect an acquaintance with the private rights of his clients or their neighbours. So that in the event of the building-owner becoming liable to his neighbour by reason of an obstruction caused to his light or air, he would, under ordinary circumstances, have no remedy over against the Architect. We say under ordinary circumstances, for the parties might contract in such a manner as to render the Architect liable to his employer. For instance, if a building-owner were to explain clearly to an architect what his neighbours' rights were, and he undertook to design a building which would not interfere with those rights, but which, nevertheless, did interfere with them, for which interference the building-owner was obliged to compensate his neighbour, under such circumstances we apprehend that the building-owner would have a right of action against the Architect.

There is no warranty implied on the part of an employer that work comprised in plans and specifications, forming part of the contract, can be done in the manner therein described ; the employer, therefore, is not liable, in an action for breach of such a warranty, to compensate the contractor for the labour and materials thrown away, should it turn out to be impossible to carry out the work in the manner specified *

* *Thorn v. London (Corporation of)*, 1 App Ca. 120 ; 45 L. J. (H L), 487.

CHAPTER VIII

48.—THE CONCURRENCE OF EXTRAORDINARY CONTINGENCIES DURING THE EXECUTION OF THE CONTRACT. 49 —A contract to do what is impossible 50.—Inevitable accident 51 —Rules of law applicable to cases of inevitable accident 52 —Vis major. 53 —Performance of the contract prevented by an act of the Legislature.

48.—We now propose to consider some of the extraordinary contingencies which may occur during the execution of the contract , and although what may be the position of the parties to a building contract, in the event of the happening of some inevitable accident, is a question which concerns the builder more immediately, perhaps, than the Architect, it seems to us that the examination of such a matter falls fairly within the scope of the present work, for the occurrence of an inevitable accident might excuse the performance of the contract altogether.

49.—If a man contracts to do a thing which, at the time of entering into the contract, he ought to have known was impossible, the law will not, when he has failed in his undertaking, allow him to plead the impossibility in extenuation , he must pay damages.

Some of our readers may here desire to remind us of the maxim, '*Lex non cogit ad impossibilia*' (The law does not seek to compel a man to do that which he cannot possibly perform), and to ask how we reconcile the proposition we have stated with that fundamental legal principle. And, first, we must

ask them to notice particularly the wording of the maxim, 'The *law* does not seek to compel a man to do that which he cannot possibly perform' When a man enters into a contract and binds himself to fulfil an undertaking, he thereby compels himself to perform it, and he cannot with accuracy say that the *law* compels him to do it. As we have before had occasion to observe, when the parties to a contract express their intention, they may be said, to a certain extent, to make their own law, and if they afterwards discover that it is too severe, that it compels them to do that which is impossible or else to pay damages, they should remember who are the authors of it and of its severity. But the meaning of the maxim is this —if on some point the intention of the parties, not being expressed, has to be implied by law—if the law has, so to speak, to be called in to make a condition for them—it will not be implied that the parties intended that which is impossible; and being anxious to enforce only the intention of the parties, the law will not seek to compel either of them to do that which is impossible.

50.—If, after entering into a contract, some unforeseen accident should happen, some disaster which the contractor could not have been expected reasonably to have calculated upon, and for which no provision is made in the contract, the law will endeavour, should neither be in default, to apportion the consequences of the misfortune fairly between the parties. For instance, if a man has agreed to provide materials for and do work upon a house, and to be paid on the completion of the contract, in the event that the house is destroyed by some inevitable accident before its completion, he will lose the remuneration which he would otherwise have received for the labour and materials bestowed upon the house, and the owner will lose the

benefit which would have resulted to him from the fulfilment of the contract. The contractor will not be allowed to recover any payment for the work which he has already executed, and the owner will not be entitled to any damages for the failure of the contractor to accomplish his undertaking. But at the risk of repeating ourselves, we must again say, that this is what the law would do only in the absence of any intention expressed by the parties on the subject. They might agree that no accident whatever should afford any excuse for the non-completion of the work according to the contract; or, that in such a case, further time should be allowed, or, that the contractor should be paid for the amount of work which he should have done indeed, the conditions which might be agreed to on the subject are numberless. But so long as they are clearly expressed, leaving no doubt of the intention of the parties, reasonable or unreasonable, wise or foolish, harsh or lenient, the Court will give full effect to them.

Having thus introduced the subject to our readers, we will refer them to a passage in the judgment in a case of *Taylor v. Caldwell*,* where the principles of law applicable to this class of cases are laid down distinctly and clearly. The facts of the case were, shortly, these.—The defendants agreed to let the plaintiffs have the use of a music-hall for four nights. After the agreement was signed, and before the first night arrived, the hall was accidentally burnt down, and the defendants were in consequence unable to fulfil their engagement. The action was brought to recover damages for the injury suffered by the plaintiffs.

Mr. Justice Blackburn delivered the considered judgment

* *Taylor v. Caldwell*, 3 B and S., 826; 32 L. J., Q B., 164.

of the Court. And we must ask our readers to read with care the passage cited below, for it was evidently the result of a careful study of the views of the Roman and French jurists, and of the English decisions on the subject. After stating the facts of the case, his Lordship proceeds to lay down the principles of law applicable to them as follows — ‘There seems no doubt that where there is a *positive* contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied, and there are authorities which, as we think, establish the principle, that where from the nature or the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist,—so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done,—then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the performance shall become impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those entering into the contract. For in the course of affairs men, in making such contracts, would, if it were brought to

their minds, say that there should be such a condition.'

In deciding the case of *Appleby v. Myers*,* and reversing the judgment of the Court of Common Pleas, the Court of Exchequer Chamber were mainly influenced by the authority last cited. In *Appleby v. Myers* the plaintiffs contracted with the defendant to erect certain machinery upon the buildings and premises of the defendant, and in his occupation, for a specified sum, and to keep the whole in order under fair wear and tear for two years. When the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault of either party, destroyed the buildings and machinery then erected thereon. And the Court held that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed †

Upon these facts Mr. Justice Blackburn, delivering the judgment of the Court, said—'We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither.' In order that the extent of this authority may be fully comprehended, and that it may not be supposed to decide more than it really does, we will endeavour to point out the limits of the decision. And, first, it should be noticed that the

* *Appleby v. Myers*, L. R., 2 C. P., 651; 36 L. J., C. P., 331 (Report of the case in the Court below); L. R., 1 C. P., 615, 35 L. J., C. P., 295.

† The learned and able arguments in this case present a condensed treatise on this branch of the law, and in them will be found a collection of the American as well as the English authorities, and an exposition of the Scotch Law, the Civil Law, and the French Law on this subject.

contract in this case was to complete certain work for a fixed sum. Had the contract been divisible, had it been to complete a certain part of the work for so much, and the remainder for so much, there can be no doubt that if the disaster had occurred after the completion of the first part of the work, when the materials would have become the property of the defendant and would have lain at his risk, the plaintiffs would have been entitled to payment for the work done and materials provided under the first part of the contract. And, indeed, according to the judgment now under examination, we may go further and say, that in the absence of anything to show a contrary intention, the *prima facie* contract is, that the contractor is to be paid for the work which he has done and the materials which he has provided, although the contract is not complete. So that, if the contract were to do work and provide materials generally, or to do repairs, a plea that 'during the progress of the works an accidental fire occurred which prevented their completion,' would be no answer to the contractor's claim for payment for the work which he had already done. But in *Appleby v. Myers* the plaintiffs had agreed to complete the whole work, and be paid when the whole was completed, and not till then. And the contract was not only to complete the machinery, but to keep the whole in repair under fair wear and tear for two years. And the Court seemed inclined to hold, that the effect of this condition would be to throw on the plaintiffs the risk, in the event of its destruction, of at least part of the machinery.

The following is the part of the judgment to which we allude :—'We think that as to a great part, at least, of the work done in this case the materials had not become the property of the defendant ; for we think that the plaintiffs, who were to complete the whole for a fixed sum, and keep

it in repair for two years, would have had a perfect right, if they thought that a portion of the engine which they had put up was too slight, to change it, and to substitute another in their opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendants.' Now, although an expression of opinion on this point was not absolutely necessary for the decision of the case, and although this was not the point on which the decision ultimately turned, still it is entitled to all the respect due to an opinion expressed in a considered judgment of the Court of Exchequer Chamber. But we cannot refrain from expressing our respectful surprise at the doctrine that the fact that a man has contracted to keep machinery in repair for two years after its completion should in any way prevent the property in that machinery from passing to him whom, but for this expression of opinion, we should have styled the owner.

However, those contractors who are not desirous of again raising this interesting point, and of incurring the expense necessary for ascertaining for their own and their country's benefit what the law upon it may be, should, when they agree to keep in repair the subject-matter of the contract after its completion, insert in the contract a proviso to the effect that, 'save and except as to any deterioration taking place under fair wear and tear, they will not be liable for any loss, injury, damage, or accident whatever happening thereto, and that, save and except as aforesaid, no loss, injury, damage, or accident whatever shall affect the contractor's right to payment.'

51.—We may now briefly recapitulate some of the rules of law applicable to cases of inevitable accident. If a man has undertaken simply to do work upon or repairs to a fabric (there being no stipulation that he is not to be paid till the

completion of the work), inasmuch as he would be entitled at any time to payment for the work then done,* he would, in the event of the destruction of the fabric by some inevitable accident, be entitled to payment for the work done upon it at the time of its destruction. And in a simple agreement such as this he would be entitled to payment for the materials which he had at the time worked into the fabric. For by being worked into the fabric they would become the property of the owner of the fabric, whether that fabric was a house, a ship, or a coat, and would be at his risk. But, should the contract be to *complete* the repairs for a fixed sum, he will not be entitled to payment till their completion,† and in the event of the destruction of the fabric by some inevitable accident before their completion he will not be entitled to any payment for the work which he may at the time have done. Should the contract be to do the work by instalments, and to be paid on the completion of each, he will in the event of the destruction of the fabric by some inevitable accident, be entitled to payment for any instalments which he may have completed at the time of its occurrence, but not for those which were incomplete. If the contract should be to complete a certain work, and be paid on its completion, the contractor in the event of the destruction of part of it before its completion must do that part over again to fulfil his contract, and entitle himself to payment. In the event of the accidental destruction of the fabric both parties are excused from the *further* performance of the contract, but a cause of action is given to neither.

* *Roberts v. Havlock*, 3 B and Ad., 404; *Menetone v. Athanes*, Burr., 1592.

† *Sinclair v. Bowles*, 9 B. and C., 92.

52.—Before passing from the consideration of the effect upon the contract of an inevitable disaster we must not omit to mention that class of accidents attributable to *vis major*, or the act of God. The act of God signifies in legal phraseology the occurrence of some extraordinary natural phenomenon. We say *extraordinary* natural phenomenon, for in order to substantiate as a matter of fact that some disaster is attributable to the act of God, it will not be sufficient to prove a convulsion or disturbance of ordinary occurrence, and for which a man of prudence ought to have provided. If a man has contracted to do certain work upon a building which is afterwards blown down by a tempest, to establish the fact that the destruction of the building was caused by the act of God it will be necessary to prove that the tempest was of extraordinary violence, and not such as the building ought fairly to have resisted. Having considered what, as a matter of fact, it will be necessary to prove in order to establish that the happening of a disaster was due to the act of God, let us enquire into some of the legal consequences of such an occurrence, and the remarks which we shall have to make here will be brief, partly because the rules of law applicable to such cases are substantially the same as those applicable in the event of an inevitable accident, which we have already endeavoured to point out; and partly because some of the rules of law applicable to cases where the parties to the contract are affected by an act of God, such as the case of the death of the Architect or contractor, we shall examine hereafter when discussing the effect upon the contract of the death of any of the parties to it. Amongst other matters elucidated and explained in the judgment in *Taylor v. Caldwell* (cited *supra*) we find enunciated the principles of law applicable to a case where the performance of a contract has been rendered

impossible by an act of God. And, although we must admit that in the instances mentioned in the judgment, the Court seemed to be considering cases where the act of God had happened to one of the parties to, rather than to the subject-matter of, the contract, still it seems to us that the whole tenor of that part of the judgment is to show that the rules applicable in the one case would be so also in the other. And this opinion is strengthened when we consider what were the facts and circumstances of the case then before the Court

If the parties have assented to a positive and absolute stipulation on the point, by that stipulation must they be bound. If the contract clearly expresses the intention of the parties—if it defines what is to be their position in the event of the performance of the contract being interrupted by an act of God, so long as it does not contemplate anything unlawful, the Court will be bound to afford its aid to give effect to that expressed intention, and as far as possible to place the parties in the position which they have defined

But in the absence of the expression of any intention that there should be a positive and absolute contract on this point, and if from the nature of the undertaking the parties must have known that a particular act of God might interfere with the performance of the agreement, it will not be construed as a positive contract, but as subject to the implied condition, that the parties should be excused in case before breach the fulfilment of the contract should be rendered impossible by an act of God without default of the contractor

53.—We must not quit this branch of our subject without an allusion to the consequences of the interruption of the performance of the contract by an act of the Legislature. The law would be unreasonable indeed were it to intend that the

parties when entering into an agreement might reasonably contemplate, anticipate, and guard against any interference with its conditions by provisions and commands which the Legislature might subsequently think fit to enact. The law presumes that the parties at the time of making the contract have an acquaintance with all that the Legislature has then enacted; but the law does not presume that a reasonable man can contemplate what the Legislature may do. And when the performance of a contract has become impossible, by reason of the provisions of an Act of Parliament passed after the making of the contract, the law applies the same rule as it does when its performance has become impossible in consequence of the occurrence of some inevitable accident, the happening of which would not have entered into the contemplation of a reasonable man, and for which no provision has been made in the contract.

We cannot offer a clearer or more succinct statement of the law on this point than that to be found in the judgment of the Court over which Lord Holt, C. J., was presiding, in the case of *Brewster v. Kitchell** ‘When H covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. The reason of the principle which is applied to cases where the performance of a contract has been rendered impossible by the occurrence of some inevitable accident, or by *vis major*, or by the provisions of an Act of Parliament, is to be found in the judgment of Mr. Justice Hannen, in the case of *Baily v. De Crespigny*.† That learned judge says,

* *Brewster v. Kitchell*, 1 Salk, 198

† *Baily v. De Crespigny*, L. R., 4 Q. B., 180; 38 L. J., Q. B., 98.

that the expression that 'the breach of a contract is excused' is, in fact, an inaccurate expression, and that what is really meant is, that the alleged breach of contract was caused by a matter not within the contract.

CHAPTER IX.

54 — 'EXTRAS' AND 'ADDITIONAL WORKS.' 55.—When the contract provides that payment shall be made only on production of the Architect's order in writing 56 —An order given subsequently to performance not sufficient 57 —The Architect's agency 58 — General rules of law as to 'extras' and 'additional works' 59 — Elementary principles applicable to cases of principal and agent.

54.—THE mention of 'extras' and 'additional works' will probably recall to the minds of our readers long and tedious enquiries—enquiries expensive and anxious to the suitors, and uninteresting and wearying to those conducting, and to those sitting in judgment upon, their suits. In one respect we will undertake that our remarks shall not resemble those enquiries—they shall not be long. And the reason why it will be sufficient to offer only brief remarks on a matter which is often the subject of litigation the reverse of brief, is that the points in dispute in such litigation are generally questions of fact rather than of law.

We will introduce the subject with some general remarks made upon it by Chief Justice Erle when delivering judgment in the case of *Russell v. Viscount Sa Da Bandeira* * His Lordship observes—'It constantly happens that in course of the performance of a contract certain deviations and additions are required, and it almost as

* *Russell v. Viscount Sa Da Bandeira*, 13 C. B., N. S., 149, 32 L. J., C. P., 68.

constantly happens that the contract contains a clause that the party who asks for these deviations and additions is not to be liable to pay for them unless some condition is performed which is to operate as a security for the price to be charged for them. But again, almost as constantly, the party who executes such order, trusting to the spoken words of the other, takes no care to see that the condition is performed which is necessary to entitle him to payment.' These observations point out the circumstances which usually give rise to disputes as to 'extras.'

55.—If the contract provides that no charges shall be demanded for any extras supplied, or additional work done, unless supplied or done in pursuance of the Architect's order in writing, the case above cited is an authority to show that the Court will be bound to give effect to such a provision. In that case Chief Justice Erle, referring to *The Thames Iron Works, &c, Company v The Royal Mail Steam Packet Company*,* says.—'The Court there clearly recognise the doctrine that, where the contract provides that alterations shall not be charged for unless they have been authorised in a particular manner, that provision must be strictly followed, or else legally waived, in order to enable an action to be maintained for such alterations.' Such is the position of the parties at law, and the mere want of writing gives no claim in equity † And, indeed, if the contractor once allows himself to be placed in the unpleasant position of having completed additional works without the proper authority, he will find it difficult to extricate himself from it, for the want of a previous order is not supplied by an order

* *The Thames Iron Works, &c, Company v. The Royal Mail Steam Packet Company*, 13 C. B., N. S., 358, 31 L. J., C. P., 169.

† *Kirk v. The Bromley Union*, 2 Phill., 640.

given subsequently to performance.* And when the parties have agreed that only such additional work shall be paid for, as was done in pursuance of the Architect's written order, the verbal order of the employer himself cannot be given in evidence to support a claim for extras in the absence of any new contract.†

56.—Indeed, all the remarks which we offered when endeavouring to explain the nature of 'conditions precedent,'‡ and when pointing out the necessity of obtaining the Architect's certificate, will apply here. If the doing or obtaining a certain thing is, by the terms of the contract, made a condition precedent to the contractor's recovering payment, that thing must he do or obtain. And if the law seems strict on this point the parties should not forget that they have in effect dictated to it its severity, for it has no option, but is bound to enforce that which they have clearly expressed to be their intention. But as soon as the law finds itself released from enforcing the relentless terms which the parties have imposed on themselves, and in a position to dictate terms of its own conception, it metes out a less stern justice. And if a man intends to take the benefit of additional work which has been done, and not to remunerate the contractor for it because (though an order may have been given by word of mouth) the work has not been executed in pursuance of the Architect's order in writing, the letter of the contract has not been complied with, he must take care not to travel out of the contract. For, if the contractor succeeds in establishing that the additional work was not within the contract, or that the deviations and alterations were not executed in

* *Lamprell v. The Bullerway Union*, 3 Ex., 283.

† *Franklin v. Darks*, 3 F. and F., 65.

‡ See ante p. 48.

course of the performance of the contract—if he succeeds in establishing either of these facts, the want of the written order will not prevent his recovering for the claim thus made out (*Russell v. Viscount Sa Da Bandeira*). Our readers, remembering that the first essential ingredient of a valid contract is *the request*, are aware that it would be necessary for the contractor to prove an order of some sort, proceeding either from the employer or his agent, or to prove some conduct on the part of the employer from which the Court would imply a previous request or order. Such, for instance, as his accepting the benefit of the services rendered or articles supplied.

In the case last cited, Mr Justice Byles went further than the rest of the Court on the point which we are now examining, and held, that as some of the disputed articles were so entirely *dehors* (i.e., without) the contract, the plaintiff might recover for them, even if they were to be considered as delivered during the execution of the contract. The employer's agent had not given any order in writing for these articles. The contract provided that the contractor should not be entitled to payment for any 'extras,' unless delivered in pursuance of such an order. The learned judge explained his meaning by the following illustration :—'Suppose a man contracts to build a house, and stipulates that there shall be no additions unless they are ordered in writing by the person for whom he is to do the work, and after he has finished the house he goes on to furnish it under a verbal order; the furniture would undoubtedly be held not to be *an addition* within the meaning of the original contract, but to be *dehors* the original contract altogether. . . . The limits are not by any means clear, as for instance, with regard to fixtures and decorations.' 'There is, however, one instrument which when deli-

vered to the contractor may make up for the want of the written order, and that is the Architect's certificate. In *Goodyear v. The Mayor, &c, of Weymouth*,* where by the contract the Architect was to certify the proper sum to be paid for work and extras, and his decision was to be final, it was held that his certificate that a certain sum was due precluded the defendants (the employers) from raising the question whether there was any order in writing.

But the certificate is of course equally binding on both parties, and would be an answer to a claim by the contractor for additional work, which the Architect had disallowed, although such work might have been done pursuant to a properly signed order.†

57.—Should additional work be executed—there being no provision in the contract requiring an order in writing—or there being such a provision, should additional work be executed, admitted, or proved to be *dehors* the contract, a question might arise as to the Architect's agency. Was he or was he not authorised to give the order? The Architect's authority may be given expressly or impliedly. The case of *Wallis v. Robinson*‡ will afford a good illustration of the manner in which points involving the question of the Architect's agency may arise. There, during the progress of the works, a process more expensive than that contracted for was ordered by the Architect. The order was given to the builder's sub-contractor (the plaintiff), and he was told that he should be paid extra for it. The employer (the defendant) was present, and knew of this order being

* *Goodyear v. The Mayor, &c, of Weymouth*, 35 L. J., C. P., 12

See also *Laidlaw v. Hastings Pier Company*, post, p 238, where the final certificate was held to be conclusive, although some of the extras had not in fact been supplied. A 'progress' certificate has not the same effect. *The Tharsis Co v M'Elroy*, 3 App Ca 1040.

† See the judgment of Mr Justice Willes, 35 L. J., C. P., 17.

‡ *Wallis v. Robinson*, 3 F. and F., 307.

given. Baron Martin ruled that there was evidence of authority in the Architect to make the contract. The defendant and the Architect both proved that no *express* authority had been given ; but the judge having ruled that there was evidence of an implied authority, the want of the express authority became immaterial.

When the contract consisted of a tender to execute certain work contained in specifications and quantities made out by the employer's surveyor and an acceptance of that tender, it was held that the builder could not recover as for extras for an excess of work performed in consequence of an error in the quantities.*

58 —We will now summarise the points which we have endeavoured to explain

If by the contract a written order is required for extras or additional work, the want of such an order will be fatal to the contractor's claim for extras supplied or additional work done in course of performance of the contract.

The want of a previous order will not be supplied by one given subsequently to performance.

The absence of it will be fatal to any claim in equity.

But should the extras or additional work be *dehors* the contract, should the order for them amount in effect to a new contract, an order in writing will not be necessary.

Should the extras or additional work be ordered by the Architect, it must in an action for their value be proved that he was authorised by the employer.

It will be sufficient to prove that he was impliedly authorised

If by the contract the decision of the Architect is to be final as to the value of the work done, in any action for extras or additional work brought subsequently to the making

* *Coker v Young*, 2 F. and F., 98 See also *Sharpe v. San Paulo Railway Co*, L. R. 8, Ch., 597.

of the certificate the question whether they were supplied or done in pursuance of a written order cannot be gone into.

59.—To have offered any general remarks on the principles of law applicable to cases of agency, when alluding to the question of the Architect's authority to order extras as agent for his employer, would have been making too wide a digression. But it seems to us that an acquaintance with a few of the most elementary of those principles can hardly fail to be useful to those for whom this work is designed, when we remember how often they act in the capacity of agents. And we offer these remarks here because the Architect's duty under the contract, as we explained when treating that part of our subject, must depend mainly on the terms of the contract, but the question of extras and additional work often, as we have seen, takes the parties out of the contract, and subjects them to the general rules of law applicable to their position.

We extract the following passages from Smith's 'Mercantile Law' (1st edition) —

'An *agent* is a person authorised to do some act or acts in the name of another who is called his *principal*. Whatever a man has power to do in his own right he may appoint an agent to do for him. *In his own right*, for an agent cannot nominate another to perform the subject of his agency.

'An agent may be in general appointed by bare words, or such appointment may be inferred from the conduct of his supposed principal respecting him. But an agent who is to execute a deed must be appointed by *deed* for that purpose. Therefore, unless the agency be of a trivial nature, the agent of a corporation must in general be appointed by deed.'

'The duties of the agent to his principal must of course

depend on the instructions contained either expressly or impliedly in his appointment. The appointment is his only authority. It may be *general* to act in all his principal's affairs, or *special* concerning some particular object, it may be *limited* by certain instructions as to the conduct he is to pursue, or *unlimited*, leaving his conduct to his own discretion. But this discretion should not be exercised at random, for in the absence of specific instructions it is his duty to pursue the accustomed course of that business in which he is employed. And he must possess a competent degree of skill in order to enable him to do so, if he engages without such skill he is a deceiver, and will be justly liable for the consequences of his incapacity. The most satisfactory mode of determining whether he have exercised such skill, is to show by evidence whether a majority or even a moiety out of a given number of skilful and experienced persons would have acted as he has done. Of whatever description his authority may be, if he exceed it and any loss ensue, that loss will fall on him, though if a benefit result, he will not be allowed to share it, but must account for it to his principal. However, if the principal afterwards recognise a departure from his instructions, he will be exonerated, and such a recognition may be inferred from the employer's conduct.

‘The chief right of the agent is to receive his remuneration, the amount of which may be fixed by contract, or by the usage of the business or profession in like cases.

‘As far as the agent's authority extends he has a right to bind the principal to third persons. If his authority is expressly given there can be no doubt as to its extent, except from the uncertainty of the words delegating it. When, however, it has to be inferred from the conduct of the principal, that conduct furnishes the only evidence of

its extent as well as of its existence ; and in solving all questions on this subject the general rule is, that *the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment.* But the authority of whatever description must be strictly pursued in order to bind the principal.

‘As the principal is bound by the acts and contract of his authorised agent, so he may take advantage of them ; and if one person *contract* even without authority, in the name of another, that other, though he may repudiate the contract, may, if he think fit, adopt and enforce it. But then he must adopt it altogether . he cannot ratify what is beneficial to himself and reject the remainder.

‘An agent contracting as such for a known and responsible employer incurs no personal liability to third parties , and where there is no responsible employer the agent is personally liable. But although special circumstances are necessary to render him liable for *contracts* made for his employer, yet it is otherwise if he commit *torts* while acting in his employer's service. In such a case the principal will, it is true, be *often* liable, but then the agent will invariably be so.’

Should the Architect, either fraudulently or bonâ fide, represent to the builder that he has authority to order materials, whereas in fact he has not, he will be liable to the builder for their value, and for the costs of an unsuccessful action brought by the builder against the employer to recover their value.*

* *Randall v. Trimmer*, 18 C. B., 786, 25 L. J , C. P., 307.

CHAPTER X.

60 —PAYMENT OF THE ARCHITECT. 61 —When the amount has been agreed upon. 62 —When not 63 —The Schedule of the Royal Institute of British Architects 64 —The right to the plans 65.—The contractor's right to payment. 66 —When the special contract is unperformed —Rule 67 —Exceptions 68 —When the contract is not faithfully performed. 69.—General rules. 70 —Parol evidence to explain 'terms of art'

60.—THERE IS no particular feature connected with the payment of the Architect which calls for special remark—that is to say, there is nothing to remove it from the operation of the law ordinarily applicable to cases of debt arising out of contract.

61.—If the Architect's services were to be rendered for a sum agreed upon, he will be entitled, on the fulfilment of his agreement, to payment of that sum from his employer

62.—If, however, no specified sum has been agreed upon, it will be implied that it was the intention of the parties that the Architect should receive a reasonable remuneration. Should the Architect's claim be resisted in such a case, on account of the alleged unreasonableness of the charges, he must be prepared to prove their fairness and propriety. For this purpose, the testimony of some members of standing and character in the profession will be necessary. The Schedule of Rules and Charges published by the authority of the Royal Institute of British Architects would not be admissible as evidence, except under special circum-

stances such as could hardly arise in the case we are now considering. An agreement by the parties that the Schedule should be evidence, or a clause in the contract by which the parties have agreed that the charges of the Architect shall be such as are authorised in the Schedule, afford instances of the special circumstances under which the Schedule would be admissible as evidence. But though the Schedule would not be evidence to prove the reasonableness of the Architect's charges, if those charges have been based on the scale contained in the Schedule, the Architect would find little difficulty probably in procuring evidence of their propriety. For a member of the Royal Institute of British Architects would scarcely say that the Schedule of Rules and Charges published by the authority of that Institute were aught but fair and reasonable; and the testimony of such a man as to the fairness of the charges demanded by the Architect would be admissible.

63.—As we are aware that much reliance is placed by the profession on the Schedule, it is perhaps right that we should offer a remark on the rule of law just referred to. Of course the members of the profession may agree to be bound by the rules regulating the professional practice and charges of Architects contained in the Schedule. The members of the Institute might agree that they would be bound by the Schedule as by a code, and that membership should be compatible only with conformity to its provisions, in short, they might adopt any measures which they thought fit, so long as they were not unlawful, to control their own conduct and to regulate their charges. We say that these rules would be binding on any Architect who had *agreed* to be bound by them—that is to say, binding to this extent, that if he were to transgress any one of them he would be liable to

all the consequences which he had agreed should be the result of his transgression.

If, then, the Schedule would be binding only on any Architect who had *agreed* to its provisions, and even then only binding as between him and the other assenting parties, *a fortiori*, it would not be binding on a layman who had no notice of, and who had not agreed to, its stipulations. Let us imagine a case of this sort—an incorporated society, instituted for the purpose of promoting some lawful and laudable object, the members of which have agreed that their conduct shall be regulated by a series of rules, and that by one of these rules they have resolved that parties contracting with them for any purpose shall (in the absence of a special agreement) be paid according to a scale of charges contained in the rules. If an Architect had prepared plans for this society, he would hardly think it just when submitting his charges, were he informed that according to the rules of the society they were too high, and that they must be reduced to the limits of the society's scale. In such a case, if (not having agreed upon any sum) the parties were unable to determine between themselves what was reasonable, the assessment would have to be made by a jury, and at the trial of such a question the society would not be allowed to refer to their rules, nor would the Architect be permitted to cite the Schedule. both parties would be at liberty to call witnesses competent to testify on the propriety of the charges, who might be sworn, examined, and cross-examined in the presence of the jury.

On the question of the fairness of his charges the Architect would not be likely to meet with disappointment from relying on the Schedule, for the reasons given above. For the testimony of the members of the Institute would afford weighty evidence on the point; not because they had autho-

rised the Schedule, but because of their experience and standing

64 —But the Architect should not rely with equal confidence on the Schedule of Rules of the Royal Institute of British Architects (1872) with reference to the property in the plans.

In the case of *Ebdy v. M'Gowan*,* which was heard and decided by the Court of Exchequer at Westminster in November 1870, it was contended that there was a custom that the property in plans which have been prepared by an Architect for his employer remains in the Architect, and that the usage is that they should be retained by the Architect. Now, one of the essential requisites for the validity of a usage or custom is, that it should be reasonable, the question whether or not a custom is reasonable is for the Court and not for the jury, and in the case above mentioned both the Lord Chief Baron and Baron Bramwell expressed strong opinions against the reasonableness of the custom. Unless there is some provision in the contract to the contrary, the employer has a right, according to this decision, to have the plans delivered up to him. If, therefore, the Architect desires to retain the property in the plans, this should, as suggested in the last part of the note to Rule 16, be made a term of the contract. It might be carried out between the Architect and the employer by word of mouth or by writing, or it might form the subject of a clause in the contract. The last line and a half of the 16th Rule, passed by the Royal Institute of British Architects in January 1862 would do very well—'it being understood that the Architect is paid for the use only of the drawings and specifications, and that they remain the property of the Architect.' The wording of the present Schedule of Rules (1872) is not in favour of the Architect on this point, for it is stated in

* *Ebdy v. M'Gowan*, post, p. 266.

Rule 11 that the professional services included in the ordinary charge are (amongst others) the preparation of drawings, specifications, &c. The only rule containing any provision as to the property in the drawings and specifications is Rule 16, in which it is stated that it has hitherto been the general custom for the Architect to be paid for the use only of the drawings and specifications, those documents remaining his property. That is to say, it bases the Architect's right, not on any agreement, but on the custom ; and the Court of Exchequer having decided against this alleged custom, it follows that there is really no provision in the Schedule tending to reserve to the Architect the property in the drawings. Indeed, the effect of the Schedule is rather against than in favour of the Architect on this point, for the foundation of the 16th Rule—the custom—being taken away by the decision in *Ebdy v. M'Gowan*, the only rule left on the subject is the 11th, in which it is stated that the Architect's duty is to prepare drawings and specifications, and it seems to us that the inference to be drawn from that statement standing alone would be that the drawings when prepared would be the employer's.

65 —In considering the subject of the contractor's right to payment, we shall find that there are many matters to be examined. Under some circumstances, though he may have done work under the contract, he will not be entitled to any payment, and under others the employer will be at liberty to deduct from the sum originally agreed upon. But we will proceed to discuss the different positions in which the parties may find themselves placed, and to point out the principles of law applicable to them.

66.—The general rule of law is that while the special contract remains unperformed no action in the common form for work and labour can be brought for anything done under

it.* We may exemplify the rule thus —If a man has contracted to build a house, and when half of it has been erected, desists and fails to perform his contract, he cannot maintain an action for the price of the work which he has done. It is plain that he cannot maintain an action on the contract, for the house is only half built. Being unable to found his action on the contract, he may seek to recover payment for the work which he has done, and bring his action for work and labour, but, according to the rule of law cited above, in this action he must certainly fail, for the special contract is unperformed, and the work for which he claims payment is work which was done under the special contract. We will examine some cases just inside the rule, and others which are exceptions to it.

67 —There is a class of cases which form an exception to the rule. Those are cases where, although the special contract has been only partly performed, the contractor has been allowed to recover a measure and value price, but then in those cases the conduct of the employer has been such as to amount to an implied promise to pay for the work which has been done. But in order to render the employer liable in such a case, the mere fact that the part-performance has been beneficial is not enough, it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done notwithstanding the non-performance of the special contract.† The case of *Munro v. Butt*‡ shows how conclusive the evidence must be to raise this implication. In that case, the plaintiff, having undertaken to do certain specified work for an

* Smith's L. C., 6th Ed., Vol II., p. 22.

† Smith's L. C., Vol. II., p. 32.

‡ *Munro v. Butt*, 8 E. and B., 738.

agreed price, on houses belonging to the defendant, the whole to be completed by a particular day and to the satisfaction of a surveyor who was named, failed to complete the work according to the terms of the contract, but did work upon the houses. The defendant resumed possession of the houses, and was therefore to some extent at the time of the trial enjoying the fruits of the labours of the plaintiff. It was held, notwithstanding, that the plaintiff could not recover, either on the special contract or for work and labour; for the special contract had not been performed, and the mere fact that the defendant had taken possession of his own houses, upon which work had been done, did not afford an inference that he had dispensed with the conditions of the special contract, or that he had contracted to pay for the work actually done according to measure and value.

There is another exception to the rule cited above, namely, where the employer has refused to perform his part of the contract, or has incapacitated himself from performing it. In such a case, the contractor may treat the contract as rescinded, and maintain an action for the price of the work done according to measure and value. But the refusal must be absolute. In *Lines v. Rees** the plaintiff contracted to build a house for the defendant. It appeared that, before the completion of the house, the plaintiff demanded payment for what had been done, and that the defendant replied that he would not pay—'perhaps never.' On this evidence the plaintiff's counsel submitted that he was entitled to recover a measure and value price, and to treat the special contract as rescinded. Mr. Justice Coleridge admitted that this would have been so had the refusal to pay

* *Lines v. Rees*, cited in Smith's L. C., Vol. II., p. 34.

been absolute and unqualified, but he thought that in this case the refusal to pay must be construed with reference to the demand, which was made, so far as the special contract was concerned, too soon. He therefore held that the plaintiff was entitled to recover only for some extra work which he had done at the request of the defendant, and which was a matter not included in the special contract.

So, also, the contract may be treated as rescinded if the contractor has incapacitated himself from performing it.*

68.—If the subject-matter of the contract has been completed, but not according to the specifications, the employer when sued for payment will be entitled to give evidence of the real value of the work which has been done in reduction of the contractor's claim. Such evidence was admitted by Lord Ellenborough in the case of *Farnsworth v. Garrard*.† In that case, the plaintiff having contracted to rebuild the front of the defendant's house, the latter discovered, after the completion of the work, that it was out of the perpendicular.

It may perhaps seem to some of our lay readers that it is hardly necessary to cite the authority of Lord Ellenborough to substantiate so simple a proposition as that a man when sued for the price of a perpendicular wall may show that the wall which has been built for him is out of the perpendicular. But formerly the employer would have been compelled to pay the builder the full price which had been agreed upon, and it would have been necessary for him to bring a cross-action to recover the difference of value between the wall contracted for and the wall which had been built. By this process justice was no doubt attained

* *Robson v. Drummond*, 2 B. and Ad., 303.

† *Farnsworth v. Garrard*, 1 Camp., 38.

in the end, but the route to that end was somewhat circuitous.

But to return to the law as it now is. The principle upon which the payment to be awarded to the contractor ought to be apportioned is thus defined by Baron Bayley: 'The rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied.'* And in the case cited above Lord Ellenborough laid down the rule thus: 'The claim shall be co-extensive with the benefit.' The expressions 'value' and 'benefit' used by those learned judges must be taken to mean, not the actual price of the materials supplied and work done, but the value which they will be to the employer, and the benefit which he will derive from them. For instance, A has contracted to build a house for B for £2000, according to certain specifications; when the house is built, and to some extent the contract has been performed, A brings his action for payment, and claims £2000; B proves that the work has not been completed according to the specifications, and that, although the materials supplied and work done may have cost £1500, still it will require £700 to complete the house in the style originally contracted for, in this case A will be entitled, not to £1500, but to £1300 †

Should the contractor work into the building materials more expensive than those contracted for, he will not be entitled to recover their value; the employer will only be liable for the price of the materials mentioned in the

* *Chappel v. Hicks*, 2 C. and M., 214.

† Many authorities and much law on this point will be found collected and expounded in the judgment of Baron Parke in the case of *Mundel v. Steel*, 8 M. and W., 858.

contract. And even should their return be possible, the contractor will not be entitled to demand it.*

If a contractor has undertaken by a written agreement to complete certain work, and in the course of performing the contract he executes some extra work, in order to recover payment for the extra work, unless he can show by positive proof that the extra work in question was entirely separate from that included in the agreement, he will be bound to produce the written agreement † By this rule all doubt as to whether certain items were or were not included in the agreement is prevented, and the production of the agreement would also settle the amount of remuneration which the parties had agreed upon. Generally, the practical difficulty in the way is the want of a stamp on the agreement.

But though the employer may, in an action brought by the contractor for payment, give evidence in reduction of the damages, and show that the work done is not equal to that contracted for, and though the rule *compelling* him to bring a cross-action no longer prevails, he may if he thinks fit bring a cross-action. The advantage conferred on him by the abolition of the rule has not deprived him of his old right—he has the option as to which course of action he shall adopt. This question was thoroughly gone into in the judgment in *Davis v. Hedges* ‡ In that case the defendant, a builder, had been employed by the plaintiff to do some work for him according to specifications. The builder brought an action for the price agreed to be paid on the completion of the work. That action was settled by payment by the employer of the whole amount claimed.

* *Wilmot v. Smith*, 3 C and P, 53.

† *Buxton v Cornish*, 12 M and W, 426

‡ *Davis v. Hedges*, L. R., 6, Q B, 687, 40 L J, Q. B, 276.

After that the employer brought an action against the builder for an alleged non-performance of the contract, and he also charged the defendant with an improper performance of the contract, and the Court held that this action was maintainable by the employer against the builder, and that the fact that in the action brought by the builder against the employer the latter might have given evidence of the improper performance of the contract in reduction of damages, did not preclude him from bringing a cross-action.

69.—We will now briefly recapitulate the rules affecting the contractor's right to payment, shorn of the explanations with which we have been endeavouring to elucidate them —

The *general rule* is, that so long as the special contract remains unperformed, the contractor cannot recover payment for work done under it, either on the contract or in an action for a measure and value price.

The *exceptions* to this rule, and the cases when the contractor may recover a measure and value price, are—

When the employer has absolutely refused to perform his part of the contract, or has incapacitated himself from performing it.

When the employer has accepted the benefit of the work done, under circumstances sufficient to raise an implication of a promise on his part to pay for it.

When he has accepted the benefit of the work done under circumstances sufficient to raise an inference that he has dispensed with the conditions of the special contract.

When work has been done, though in the course of the contract, which was not included in the contract.

When the contract has been performed, but not faithfully performed, in an action by the contractor for payment, brought either upon the contract or for a measure and value

price, the employer will be entitled to give evidence of the faithlessness of the performance, in reduction of the contractor's claim ; or he may bring a cross action, or bring an action subsequently and claim damages in respect of the same cause of complaint which he might have proved in the action against himself, and for any others which he may have against the contractor.

70.—There is a matter which hardly falls within any of the rules, applicable to the contractor's right to payment, nor is it included in any of the exceptions which we have collected, but which we must not omit to mention ; we allude to the admissibility of parol evidence, to explain what are technically styled 'terms of art,' made use of in the contract, the explanation of which may materially affect the amount payable to the contractor. We might perhaps with propriety have considered the question, when we were discussing the exceptions to the rule by which parol evidence is not admissible to explain a written instrument. But as in the case which we now propose to examine, the question of the amount to which the contractor was entitled was dependent on the question whether parol evidence was admissible to explain an expression made use of in the contract, it seemed to us that the matter might with equal propriety be discussed here.

In the case of *Myers v. Sarl*,* by one of the conditions of the contract, it was provided that no alterations or additions should be admitted, unless directed by the employer's Architect in writing under his hand, and that a weekly account of the work done thereunder should be delivered to the Architect every Monday morning next ensuing the performance of such work. The matter having been referred to arbi-

* *Myers v. Sarl*, 3 E. and E., 306 ; 30 L. J., Q. B., 9.

tration, the arbitrator admitted parol evidence to show that by the usage of the building trade ‘weekly accounts’ meant accounts of the day work only, and did not include extra work, capable of being measured. And on a case which was afterwards stated, the question for the opinion of the Court was, ‘Was the arbitrator right in admitting parol testimony to show the meaning of the term “weekly accounts” as used in the contract?’ And the Court held that the evidence was correctly admitted; acting on the principle that parol testimony is admissible to explain an expression made use of in a written contract, when that expression has, in the trade or business in which the contract is made, a particular meaning.*

We may say generally, that if it be shown that a particular expression made use of in a written contract or instrument is a ‘term of art,’ that is to say, an expression which has a special and peculiar meaning, well-known and recognised in the particular trade, business, profession, or calling, in which the contract is made, parol evidence will be admissible to explain it.

* Much information on this subject will be found collected in ‘Best on Evidence,’ p 316, and in the judgment of Baron Alderson, in *Grant v. Maddox*, 15 M. & W., 737.

CHAPTER XI.

71.—PENALTIES. 72 —Difference between ‘penalties’ and ‘liquidated damages.’ 73 —Whether a sum reserved be a ‘penalty’ or ‘liquidated damages’ is a question for the judge 74.—May be deducted by the employer from the contract price, or set off in an action for extras brought after the contract price has been paid 75 —The employer is not entitled to deduct penalties if he has caused the delay 76 —Although he may only have caused part of the delay 77 —But, though the employer may have caused the delay, he will be entitled to deduct the penalty, if the contract is so worded

71.—It is probable that the heading which has been placed above the remarks which we are about to offer, will prove more likely to give most of our lay readers an idea as to what is intended to be discussed in this chapter, than the title of ‘liquidated damages’ would have done. And, indeed, for our own sakes we are inclined to hope that this may be so, for in order to effect this object, we have sacrificed accuracy. Those payments which Architects and builders are in the habit of calling ‘penalties’ are strictly speaking not penalties, and indeed, if they were penalties they would not be recoverable in a Court of Law, and a Court of Equity would relieve against them. But that they are liquidated damages and not penalties was decided so long ago as 1787, in the case of *Fletcher v. Dycke*,* and Mr. Justice Ashurst then said that a Court of Equity would not relieve against them.

72.—We should be departing too much from our subject were we to explain at any length the nice and intricate question of the difference between *penalties* and

* *Fletcher v. Dycke*, 2 T. R., 32.

liquidated damages. Suffice it to say, that the Court will look at the whole contract; and if it appears that the sum mentioned in it, as the amount to be paid on the breach of the contract, or on the failure of the contractor to perform the contract by a certain day, is really an *assessment* which the parties have agreed to, as the compensation for the damage which may be occasioned by a breach or failure in the performance of the contract, the jury will be relieved from inquiring into the amount of damage, and if they find that any is due, the parties will be bound by the assessment to which they have thus by anticipation agreed. The Court imagines that the intention of the parties in ascertaining, or 'liquidating' as it is termed in law, the amount to be paid to the one who may be aggrieved by a failure in the performance of the contract, was that any altercation as to the amount of damages should be avoided. This intention the Courts approve of, for in many cases it would be impossible for a jury to ascertain the exact amount of damage occasioned by the breach of a contract. But though the Courts will enforce as far as possible the assessment of damages which the parties have assented to, they will not allow one party to impose a *penalty* on the other, and if the Court sees that this is what is really being attempted, it will relieve the delinquent, and restrain the would-be oppressor, directing the jury to award that amount of damages only which will fairly compensate him for the injury which he has sustained.*

In the case of a contract for the repayment of money lent, it is not difficult to ascertain whether the intention of the parties is really to do what is equitable. When, for instance, the borrower of £500 has promised to repay it and interest at the end of six months, or on default to

* *Randall v. Everest*, 2 C. and P., 577. *In re Newman*, 4 Ch. D., 724.

pay a sum of £1000, the Court will not permit him to recover the penalty, and whether or not the defaulter shall be relieved depends on the result of a simple money calculation. But in such a case as the failure to perform a building contract the matter is not so simple ; the assessment of damages in such a case is, under any circumstances, a difficult question ; and so long as the question is simply whether the amount of compensation sought to be exacted from the contractor is not more than is warranted by the circumstances, it will be hopeless to invoke the aid of the Court. The answer to the applicant in such a case is palpable: ' You yourself were a party to this assessment which you now complain of, what—if, instead of being as you allege exorbitant, it had turned out to be insufficient—would you say to us were we to assist the employer in exacting from you a larger sum than that which you have both agreed to?' But though the Court, so long as it is in any way a question of amount, will not be prevailed upon to interfere, we apprehend that this would not be so, even in a building contract, where the case presented to it was a flagrant attempt to exact a penalty, to which there could not, by any pretence, be imparted the semblance of ascertained damages. We must therefore caution those who, being anxious to ensure the completion of a contract, import into it severe terms to be imposed in the event of failure, lest their very anxiety should cause them to defeat their own ends. And they must not imagine that they can protect themselves by any terms which they may make use of, for if the contract provides that in the event of a breach a certain sum is to be payable by the contractor ' as and for liquidated or ascertained damages,' and the Court sees that there is no pretence for saying that the employer could possibly have been damnified to the extent named, but that

an attempt is really being made to impose a penalty, it will interfere; and the employer will be awarded, in all probability, a smaller sum than he would have been able to obtain had his terms been less exacting.

73.—Should the question which we have been discussing be raised at *Nisi Prius*, the determination of it will not be left to the jury, but will rest with the judge. Chief Justice Wilde, in the case of *Sainter v. Ferguson*,* said that questions of this kind have been sometimes left to the jury; but, he adds, 'it is now clearly settled, that whether the sum mentioned in an agreement to be paid for a breach' is to be treated as a penalty or as liquidated and ascertained damages, is a question of law to be decided by the judge, on a consideration of the whole instrument.

74.—In the case of *Duckworth v. Alison*,† the agreement provided that, should any payments become due in consequence of a failure to complete in time, the employer should be entitled to deduct them from the contract price. Such payments did become due, but the contract price was paid without deducting them. In an action brought subsequently by the builder to recover the price of extra work done in the course of executing the contract, the employer set off the penalties. It was argued that as it was provided by the agreement that they were to be deducted from the contract price, the employer was not entitled, having paid that price without deducting them, to set them off in the action for the price of the extras. But the Court held that the power of deducting the penalty from the contract price was an additional power—that the employer had a double remedy,

* *Sainter v. Ferguson*, 7 C. B., 727.

† *Duckworth v. Alison*, 1 M. and W., 412. See note to p. 96.

either to set it off as a payment, or to deduct it from the contract price.

75.—If the delay in the completion of the contract should have been caused by the employer, he will not be entitled to deduct penalties (unless, of course, the contractor has agreed that even in such a case he will be liable). Indeed, under some circumstances, not only will the contractor not be liable for penalties for the time during which he was delayed by the employer, but he may be absolved from the payment of penalties altogether. This would be so if the conduct of the employer was such as, in law, would excuse the contractor from the performance of the specific contract originally entered into. This was decided in the case of *Holme v. Guppy*.* There the plaintiffs entered into a contract, on the 19th of April, to build for the defendants a brewery, so far as regarded the carpenter's work, within the space of four months and a half next ensuing the date of the agreement, and in default of completing the same within the time limited, to forfeit the sum of £40 for each week that the completion of the work should be delayed beyond the 31st of August, that amount to be deducted from the contract price as and for liquidated damages. The plaintiffs did not begin the work till four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession. They were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons, &c., employed by the defendants, and the work was not completed till five weeks after the time limited. Upon these facts the considered judgment of the Court was delivered by Baron Park, and as it is very important, and

* *Holme v. Guppy*, 3 M. and W., 387.

bears directly on the topic we are now discussing, and is not long, we will give it in full :—

‘On looking into the facts of the case we think no deduction ought to be allowed to the defendants. It is clear from the terms of the agreement that the plaintiffs undertake that they will complete the work in a *given* four months and a half, and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a-day. Then it appears they were disabled by the act of the defendants from the performance of *that* contract, and there are clear authorities that if one party be prevented by the refusal of the other contracting party from completing the contract within the time limited, he is not liable in law for the default. It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract, and there is nothing to show that they entered into a new contract to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large, and consequently they are not to forfeit anything for the delay.’

76.—The case of *Russell v. Viscount Sa Da Bandeira*,* which we have before referred to on another point, is, if possible, a stronger authority on the question of the employer’s default excusing the contractor’s failure. There it was agreed that if there should be any delay in the completion of the contract, and the employer’s agent should certify that such delay was owing to matters beyond the control of the contractor, the penalties should not be enforced for

* *Russell v. Viscount Sa Da Bandeira*, 13 C. B., N. S., 149, 32 L. J., C. P., 68; *Laidlaw v. Hastings Pier Co.*, post, p. 238.

the number of days named in the certificate. The contract was not completed till long after the specified time. No certificate was given. But the Court, acting upon *Holme v. Guppy*, held that as six weeks of the delay had been occasioned by the interference of the defendant or his agent, no penalties were recoverable for any part of the delay.

In *Laidlaw v. The Hastings Pier Co.*,* the engineer had power to extend the time for the completion of the work. He sent in certificates for advances after the date fixed for the completion, and in his final certificate he took no account of the penalties. The Court held that this afforded evidence that the engineer had extended the time, and that the defendants were not entitled to deduct the penalties.

77.—When remembering these strong and important decisions, our readers should not lose sight of the terms of the contracts which were then before the Courts. And though the Courts in those cases were in a position to impose just and equitable terms upon the parties, this is unhappily not always so, and the Courts have not always the opportunity of meting out that justice which they would desire to, for, as we have before explained, the Courts are bound in cases of contract to enforce that which the parties have expressed to be their intention, and if they have clearly expressed that their intention is, that one may impose, and that the other is to submit to, terms which are severe, those terms, and those terms only, will the Courts have any power to

* *Laidlaw v Hastings Pier Co*, post, p 238 In this case it was also decided that the defendants, having from time to time made advances without retaining sums due for penalties, had disentitled themselves to act on the penalty clause at the conclusion of the contract It is difficult to reconcile this with *Duckworth v Alison*, cited above, p 93, but as that case was not noticed, it can scarcely be said that the Court intended to overrule it.

enforce. It would be hopeless for a man to ask to be relieved from the severity which he has agreed to submit to. When considering the subject of the Architect's authority, it will be remembered, we examined the case of *Jones v. St John's College, Oxford*.^{*} Our readers may recollect that the agreement was there so worded that the employers were enabled to recover a large sum as liquidated damages for delays which had been occasioned by alterations which their own agent had ordered.

The general rules, then, which are applicable to cases where it is sought to recover liquidated damages for delay in the completion of the contract are but few, and the position of the parties must depend mainly on the *terms of the agreement*.

If a certain sum has been agreed upon by the parties as liquidated damages, to be paid in case of delay in the completion of the work, the payment of such sum will be enforced by the Court, unless it appears that such sum is in reality not ascertained damages but a penalty ; in which case the jury will be directed to award that amount of damages only which will fairly compensate the employer for the injury sustained.

Should the delay have been caused by the employer or his agent, no sum will be recoverable for liquidated damages, unless a stipulation to the contrary has been agreed to by the parties, such as that in *Jones v. St. John's College, Oxford*.

^{*} *Jones v. St. John's College, Oxford*, L. R., 6 Q. B., 115; 40 L. J., Q. B., 80.

CHAPTER XII.

78.—BANKRUPTCY OF THE ARCHITECT. 79 —Property which vests in the assignees of a bankrupt—property which does not 80 —The Architect's contract is personal 81.—Executed contracts of a bankrupt Architect. 82 —Contracts of a bankrupt builder 83 —Action by assignees for unliquidated damages—when maintainable. 84 —When not 85.—Bankruptcy of the employer.

78.—‘*In no case,*’ remarked Baron Rolfe, in the case of *Gibson v. Carruthers*,* ‘*can the party who contracted with the bankrupt set up the bankruptcy against the assignees, as a reason for not doing what he has contracted to do.*’ But the same learned judge also says that where the performance of some duty by the bankrupt forms a condition precedent to the doing of an act which the other contracting party has agreed to do, there—unless that duty be performed by the bankrupt or his assignees—it is plain that no obligation exists on the other party to perform his part of the engagement, and this rule is based on principles quite independent of any question arising from bankruptcy. Where then the duty to be performed depends on the personal skill of the bankrupt, the assignees will not be able to avail themselves of the contract, for not being able to perform the duty which forms the condition precedent, they will not be in a position to enforce the contract against the other contracting party.

79.—In the case cited above, Baron Parke, defining

* *Gibson v. Carruthers*, 8 M. and W., 321.

the property which would vest in the assignees of a bankrupt, and that which would not so vest, said that they would be entitled to avail themselves of 'every beneficial matter belonging to the bankrupt's estate, and amongst the rest the right of enforcing unexecuted contracts by which benefit might accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees, such as, in short, would pass as part of his personal estate to his executors, if he had died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration.'

80.—It can scarcely be necessary to cite any decision to prove that the contract, ordinarily entered into by the Architect, is a *personal contract*, by which expression is meant a contract the performance of which must depend on personal skill and judgment. However, the case of *Stubbs v. The Holywell Railway Company** may be taken to be a decision on the point. That case is an authority to show that the contract entered into by a member of a kindred profession, an engineer, is a personal contract. This, then, is our position—the contracts generally of a bankrupt pass to his assignees, but when the performance of some duty forms a condition precedent, that duty must be performed to entitle the assignees to recover. Where that duty is personal to the bankrupt, the assignees cannot perform it; hence the personal contracts of a bankrupt do *not* pass to his assignees. Thus then we have the rule, and the reason for the rule, that the contract ordinarily entered into by an Architect would not, in the event of his bankruptcy, pass to his assignees.

* *Stubbs v. The Holywell Railway Company*, L. R., 2 Ex., 311 ; 36 L. J., Ex., 166.

81.—These rules are applicable strictly to the unexecuted contracts of the Architect, and it should be remembered that the reason why the assignees of a bankrupt Architect cannot adopt and complete his contracts for the benefit of the estate, is because their execution depends on qualifications personal to the Architect, and not upon considerations affecting his property. So soon, however, as that which is personal to the Architect has been performed, and the contract has become a mere matter of property, so soon—the cause for it no longer existing—will the rule vary. And when the Architect has fulfilled his part of the contract, his assignees may adopt it, and sue the employer for the remuneration which may be due to him.

82.—With regard to a builder, his contract would not, as a general rule, be considered a personal contract, and consequently, in the event of his bankruptcy, it would vest in his assignees; and ‘in order to enforce these contracts it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or contemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contract than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones, nor anticipating the period of performance on either side. If the assignees adopt the contract, and do all that the bankrupt ought to have done, they may recover from the employer the damages which the bankrupt himself could have recovered if he had performed his contract. If they do not adopt the contract, they lose the benefit of it, and the other contracting party has his remedy against the bankrupt.’* The law does not require that the

* Per Baron Parke, *Gibson v. Carruthers*, 8 M. and W., 333

assignees should give notice of their adoption of the contract. The law only requires them, if they adopt it, to perform the bankrupt's part of it as and when he should have done it himself.* But if the assignees omit to declare their election within a reasonable time, such omission will be taken to afford evidence of their intention to abandon the contract † And it is a general rule that the assignees cannot affirm the bankrupt's contract in part and repudiate it as to part ‡

83.—The right of the assignees to enforce by action any claims of the bankrupt is not limited to claims for liquidated damages, they may also sue for unliquidated damages for the breach of any contract made with the bankrupt, provided that such breach of contract is a matter affecting his estate.

In the case of *Wright v. Fairfield*,§ one Bracewell entered into a contract to execute certain masonry work, and the defendant undertook to supply him with stone for the purpose. the defendant failed in this undertaking, and in consequence Bracewell was unable to complete his contract, and the other contracting party, pursuant to the agreement, terminated it. After this Bracewell became bankrupt, and the plaintiffs, his assignees, sued the defendant for the breach of the contract which he had made with Bracewell. And the Court held that, as the injury was a matter which affected the *property* of the bankrupt, the plaintiffs were entitled to maintain the action.

84 —On the other hand, when the injury occasioned by the breach of a contract made with the bankrupt affects his

* *Ibid.*, p 334

† *Lawrence v. Knowles*, 5 Bing., N. C., 399

‡ Smith's Mercantile Law, 1st ed., 445.

§ *Wright v. Fairfield*, 2 B. and Ad., 727.

feelings only, causing him pain of body or mind, the right of action does not pass to his assignees.

Since the assignees of a bankrupt contractor may, if they think that such a course will benefit the estate, adopt and complete any of his unexecuted contracts, it almost follows, that they may sue for any remuneration which may be due to him under contracts which he has executed.

85.—As regards the employer, most of the general principles which we have quoted above will apply to his case, as well as to that of the builder. Should he become bankrupt during the execution of the contract, his assignees may adopt and complete the contract, doing all that he was bound to do, if they think the estate will be benefited thereby.

We have throughout these remarks used the expression 'assignees,' though at times that of 'trustees' would have been strictly correct. In the quotations which we have made from the earlier authorities, the word 'assignees' is, of course, always used, and it seemed to us that the constant use of one expression would be less likely to lead to any mistake than the use at times of 'assignees,' and at others of 'trustees.'

We may thus sum up the results of the above paragraphs:—

The Architect's contract is a personal contract.

The assignees of a bankrupt Architect will not be entitled to complete his unexecuted contracts.

But they may recover any remuneration which may be due for those which he has executed.

The contracts of a builder are not personal contracts.

The assignees of a bankrupt builder are entitled to his rights of contract.

They may adopt or reject them.

They are not bound to give notice of their intention, but an omission to give notice, within a reasonable time, of their intention to adopt, will afford evidence of their intention to abandon.

They must adopt entirely, or reject entirely ; they cannot adopt in part, and reject in part.

If they adopt, they will be bound to do all that the bankrupt was bound to do, and they will be entitled to all that he would have been entitled to.

They may sue for unliquidated as well as liquidated damages for the breach of any contracts which may have been made with the bankrupt, provided that such breach of contract is a matter affecting his estate.

All the rules we have mentioned as applicable to the case of the builder's bankruptcy, will be also applicable to the case of the bankruptcy of the employer.

CHAPTER XIII.

86 —AN ACT OF GOD HAPPENING TO THE PARTIES TO THE CONTRACT.

87 —When the contract is personal 88 —Death of the Architect during the performance of the contract—amount recoverable by his representatives 89 —When the contract is silent on the point 90 —Representatives of a deceased Architect not entitled to complete his contracts 91 —Builder's contract not personal—exception 92 —Death of the builder—his representatives may complete his contracts 93 —They are liable on his contracts 94 —Though not mentioned in the contract. 95 —Death of the employer 96 —Effect of an epidemic breaking out where the work is to be executed.

86 —We have in a previous chapter considered what would be the position of the parties, if an act of God, happening to the subject-matter of the contract, were to render the performance of the contract impossible. We propose now to examine how the contract would be affected by the happening of such an event to either of the parties to it.

It was remarked by Chief Baron Pollock in the case of *Hall v. Wright* * that 'all contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be able to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that

* *Hall v. Wright*, E. B. and E., 746 ; 27 L. J., Q. B., 345.

if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages, any more than his executors would be if he had been prevented by death.' And Mr. Justice Compton in the same case observed 'Where a contract depends on personal skill, and the act of God renders it impossible, as for instance in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused, and his death might also have the same effect'

87.—In the preceding chapter we explained that the contract ordinarily entered into by an Architect would be considered a personal contract. From the extracts given above will be seen the kind of calamity which will excuse the non-performance of the contract by the Architect. And upon this point it will not be necessary for us to add any further remark, for the above extracts, which we have intentionally made somewhat lengthy, in order that we might not only give the principles of law applicable to it, but also give them with authority, contain all that need be said here upon it.

88.—But, should the Architect die during the performance of the contract, a question might arise as to the amount which his personal representatives would be entitled to recover. Such a question was discussed in the case of *Stubbs v The Holywell Railway Company** There an engineer was engaged to construct certain works, which it was calculated would occupy fifteen months, and he was to be paid for his services during that period a sum of £500 by equal quarterly instalments. Shortly after the end of the third quarter he died, two of the quarterly instalments then

* *Stubbs v. The Holywell Railway Company*, L. R., 2 Ex., 311 ; 36 L. J., Ex., 166.

remaining unpaid. It was contended on behalf of the defendants that the special contract with the plaintiff was rescinded by his death, and that, the special contract being rescinded, all that remained was a right to recover on the implied contract for the work actually done. The Court, however, held that, on the day after the third quarterly instalment had become due, a right of action vested in the engineer, and that on that day he was entitled to sue the defendants for the amount of the two instalments ; and that, though his death had dissolved the contract, it had not divested the right of action which had vested in him, and that such right of action passed to his representatives.

But, it may be asked, if an Architect had undertaken to complete certain work for a fixed sum not payable in instalments, and died before its completion, what would be the position of his representatives? Baron Martin, in the case cited above, answers this question. His lordship says ‘If a man enters into a contract to do certain work, for which he is to be paid a certain sum, it is perfectly clear that if he has not done the work he can receive no payment ; if, therefore, he happens to die after having done nine-tenths of the work, and has left undone one-tenth, he cannot receive any payment at all, because he has not performed his contract, and the bargain was not to pay for nine-tenths but for the whole of the work.’*

89 —If the contract were silent as to the amount and the time of payment, the representatives of a deceased Architect would be entitled to recover the value of the work actually done at the time of his death. It must not be forgotten that the foregoing observations are applicable strictly to personal contracts.

* 35 L J, Ex, 167.

90.—To those who have read the preceding chapters it will be hardly necessary to observe that the Architect's contract is not one which his representatives, in the event of his death, would be entitled to complete.

91.—We have said above that the contract of the builder would not as a general rule be considered a personal contract. It is, however, possible for a case to arise which would form an exception to this rule, and which would fall within the definition of a personal contract. In the case of *Wentworth v. Cock** Mr. Justice Patteson mentioned a case where a contract to build a lighthouse was held to be personal, on the ground of its being a matter of personal skill and science. In such a case, it is hardly necessary to observe, the contract, though made by a builder, would not pass to his assignee. The test, of course, in these cases is not the calling of the man making the contract, but the nature of the contract itself a builder might enter into a personal contract, and an Architect might make a contract which was not personal, though such, respectively, would not be the nature of the contracts which either of them would usually enter into.

92.—Let us now consider what effect the death of the builder would have on the contract. We have just seen that the contract of the builder is not, under ordinary circumstances, a personal contract. And, consequently, as an executor or administrator becomes entitled in general to all the debts and rights of contract to which the deceased was entitled at the time of his death,† the representatives of a deceased builder would be entitled to complete his unexecuted contracts. So much, then, for their rights; and as to their

* *Wentworth v. Cock*, 10 A and E., 42.

† Leake on Contracts, p. 636.

liabilities, Baron Parke, in the case of *Siboni v. Kirkman*,* observed: 'Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required.' We may cite the case of *Marshall v. Broadhurst*† as an instance of the executors being entitled to complete a contract of the testator. There the testator having agreed to do certain work, died before it had been commenced, and his executors performed the contract, using his materials. And the Court held that they were entitled to recover as executors, and the following passage occurs in the judgment 'If a party contract for himself and his executors to build a house, and [he] die, the executors must go on, or they would be liable to damages for not completing the work, if they go on it is work and labour done by them as executors, they may recover as executors, and the money when recovered will be assets in their hands.'

93.—The case of *Wentworth v. Cock*‡ affords an instance of the representatives being held liable on a contract of the deceased. There C. had agreed to take from the plaintiff a certain quantity of slate, monthly, until a certain date, and the Court held that the plaintiff might maintain an action against C's administrator for refusing to receive slate sent in pursuance of the contract after C's death, and before the date mentioned in the agreement.

In the case of *Siboni v. Kirkman*, Baron Parke cited the case of *Quick v. Ludbarrow*,§ where the testator had cove-

* *Siboni v. Kirkman*, M and W, 418

† *Marshall v. Broadhurst*, 1 C and J, 403.

‡ *Wentworth v. Cock*, 10 A and E, 42.

§ *Quick v. Ludbarrow*, 3 Bulstr, 30.

nanted to build a house, and the executors were held bound to carry on the building after the testator's death.

94 —And the mention of the representatives in the contract is immaterial. Mr Justice Littledale's judgment in *Wentworth v. Cock* was as follows —‘ No doubt the personal representatives are bound, although not named, and they are bound to pay damages out of the assets, if they do not take the contract upon themselves.’

95.—With regard to what would be the position of the parties, in the event of the death of the employer, our remarks need be but brief, for, from what we have already said, our readers will probably have formed a correct idea on the subject. His representatives would be bound to complete the contract, or to pay damages out of the assets

96.—There is one extraordinary calamity which we may mention here, since its occurrence might affect all the parties to the contract, for it would excuse a delay in its performance. Lord Campbell, C.J., in *Hall v. Wright*,* says (citing 1 Roll. Abr., p 450, pl. 10) —‘ If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after’ His lordship then adds :—‘ Time not being of the essence of the contract, the existence of the plague *might* be pleaded in suspension and in excuse of performance of it on that day, but the contract was not dissolved, and if the house had not been built in reasonable time afterwards, the covenantor would have been liable in damages.’

* *Hall v. Wright*, E. B. and E., 746 ; 27 L. J., Q. B., 345.

It may have been noticed that, in the quotation given above, instead of citing the passage from Rolle's Abridgment, we have given Lord Campbell's citation of it, and that we have before frequently adopted a similar course, for the obvious reason that it adds to the weight of the cited authority that of the judge who cites it.

To summarise. An incapacitating calamity happening to the body or mind of the Architect will excuse the performance of the contract by him.

The Architect's contracts being personal contracts, his representatives will not be entitled to complete any which may be unexecuted at the time of his death.

The amount of remuneration, if any, which his representatives will be entitled to recover for work done by him in his lifetime, will depend mainly on the terms of the contract.

The builder's contract, not being personal, will pass, on his death, to his representatives.

If they have assets, they will be bound to execute it, whether they are mentioned or not in the contract ; or they will be liable to pay damages out of the assets.

They may enforce the contract against the other contracting party, and recover remuneration for its execution.

If the representatives of a deceased employer have assets, they will be bound to go on with the contract, or pay damages.

CHAPTER XIV.

97.—THE ARBITRATION CLAUSES—GENERAL OBSERVATIONS. 98 — The submission 99.—Not revocable without leave of the Court or a judge 100 —Not determined by the bankruptcy of either party. 101.—Remedy if either party refuse to appoint an arbitrator, or if the arbitrator should die 102 —Stamps on a submission. 103.— Making the submission a rule of Court. 104 —Advantage of making the submission a rule of Court 105 —Attempt to bring an action after an agreement to refer to arbitration. 106.—Agreements ‘ousting the Courts of their jurisdiction’ void. 107.— Notice of meetings 108 —Mode of conducting an arbitration. 109 —Effect of an agreement between one of the parties and the arbitrator likely to bias his judgment 110 —Arbitrator may obtain assistance or advice in drawing up his award. 111. —Appointment of the umpire 112 —The award. 113.—Stamps on an award. 114.—Costs of the reference. 115 —Action on the award

97.—THE arbitration clause is so commonly inserted in building contracts, and so frequently are its provisions resorted to, that we have thought it desirable to devote a chapter to the explanation of some of the general rules of law applicable to arbitrations, and to point out some of the precautions which laymen should be careful to adopt when conducting a reference without professional assistance.

And we will begin by seriously warning our readers not to commit themselves to the kind of agreement which is some-

times entered into, that neither of the parties shall obtain professional advice or receive professional assistance, and that in no event shall any lawyer have anything to do with the proceedings. It is difficult to overestimate the value and importance of a little well-timed advice or assistance; it may be the means of weathering a point upon which destruction would otherwise be inevitable. It is a dangerous and usually costly experiment to attempt to apply a natural system of law to a highly artificial state of existence—to endeavour to apply the simple code of the backwoodsman to the complicated conditions of life which we must here experience. The law alters and adapts itself to our changing ideas and customs with an almost nervous sensibility, and, this being so, it is difficult to conceive how, in some respects, it could be aught else than subtle and complicated. That to a certain extent a layman may be made aware of the general principles of law applicable to his own particular calling, we hope we have by this time succeeded in showing, but we should as little like to argue that in England in the nineteenth century he could altogether and at all times dispense with the aid of skilled practitioners, as that the ‘Peculiar People’ could exist in health without the assistance of occasional medical advice.

We purpose in the present chapter to show our readers, if they conduct an arbitration unaided professionally, in what train matters should be laid, so that if it should become necessary to invoke the assistance of the Court, no difficulty may be experienced through neglecting to adopt some simple precaution in the first instance.*

98.—The agreement by which parties consent to submit

* Excepting where other authorities are cited, we are mainly indebted for the present chapter to Smith’s ‘Action at Law,’ and ‘Russell on Arbitrations.’

their differences to the decision of an arbitrator is termed a 'submission.' It is the submission which invests the arbitrator with authority.

When the matter intended to be submitted to arbitration is the subject of an action pending in one of the Superior Courts, the cause may, by the consent of the parties, be referred at any time before trial by judge's order or rule of Court. It is usually referred by the former. A cause may also be referred by order of *Nisi Prius*, when it is called on for trial, with or without a verdict being taken, as the parties may think proper. The attorney in the cause has authority to refer it on the part of his client

If there is no cause in Court, the submission cannot be by rule or order. In this case, as also where an action is pending, the matters in difference may be referred to arbitration by mutual bonds, by deed, by written agreement, or by parol agreement, in which last-mentioned case, however, the submission cannot be made a rule of Court, even although the parties consent to it, for this and for other reasons it is not advisable to refer by parol

The submission may be contained in a clause of the contract, or it may form the subject of a separate agreement. No particular form is necessary, so long as it expresses the intention of the parties to be concluded by the decision of the arbitrator. The regular form of submission—a part or the whole of which could be used as required—will be found in the Appendix, p. 225. Care should be taken that all necessary parties join in the submission, in order that the award may be an effectual and binding one. The submission, if by deed, should be executed by the parties themselves, and not by their attorneys or agents, unless by virtue of a power of attorney.

One of two or more partners cannot bind the others by a

submission to arbitration of matters arising out of the business of the firm, without an express authority for that purpose

The submission should specify the matters in controversy between the parties. If it is a general reference, the phrase 'of all matters in dispute between the parties' should be used. However, clauses will be found in the form given in the Appendix, calculated to meet any emergency that may arise, but care should be taken to include in the submission clauses 5, 6, 8, and 16.

If parties agree by deed that any disputes which may happen to arise between them shall be referred to arbitration, in the event of disputes arising, the appointment of the arbitrator should be in writing, for if made by word of mouth, being a parol submission, it cannot be made a rule of Court.* But such a deed would amount to a submission, if the arbitrator were named in it.†

99.—It is now provided‡ that the power and authority of any arbitrator or umpire appointed by or in pursuance of (amongst other things) any submission to arbitration, containing an agreement that such submission shall be made a rule of Court, shall not be revocable by any party to such reference without the leave of the Court, which shall be mentioned in such submission, or by a judge, and the arbitrator or umpire is required by the Act to proceed with the reference notwithstanding any such revocation, and to make his award, although the party making such revocation shall not afterwards attend the reference.

100.—The bankruptcy of either of the parties does not determine or rescind a submission to arbitration.§

* *Ex parte Glaysher*, 34 L J, Ex, 41.

† *Parkes v Smith*, 15 Q B, 297.

‡ 3 and 4 Will IV, c 42, sec. 39.

§ *Hinsworth v. Bryan*, 1 C B., 132.

101.—The Common Law Procedure Act, 1854,* provides that if any party (to a submission) refuse to appoint an arbitrator, or any arbitrator to appoint an umpire, or if any or either of the arbitrators or the umpire refuse to act, or die, or become incapable of acting, the party aggrieved may have a speedy remedy, provided that the terms of the document authorising the reference do not show that it was intended that any vacancy should not be supplied. He may serve the remaining parties, or arbitrator, as the case may be, with a written notice, requiring him, or them, to appoint an arbitrator, or umpire, and if such notice shall not have been complied with within seven clear days after it shall have been served, it shall be lawful for a judge of the Superior Courts, upon summons taken out by the party who shall have served such notice, to appoint an arbitrator or umpire, as the case may be. And such arbitrator or umpire has like power to act in the reference and make an award as if he had been appointed by the consent of the parties.

102.—The submission requires an ordinary agreement-stamp.† One stamp only is necessary, although there are many parties to the submission, having separate legal interests, provided they have a sufficient community of interest in the subject-matter of the reference. An agreement endorsed on the arbitration-deed enlarging the time, or changing the arbitrator, is a new submission in writing, incorporating into itself all the terms of the original submission, and requires an agreement-stamp.

* 17—18 Vic, c. 125, sec. 12.

† An agreement, or a memorandum of agreement, made in England or Ireland under hand only, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, is liable to a stamp duty of 6d.

103.—By the Common Law Procedure Act, 1854, sec. 17, any *written* submission by consent may be made a rule of any of the Superior Courts of Law or Equity on the application of any parties thereto, unless it appears from such submission that the parties intend that it should not be made a rule of Court. If it is provided in the submission that it is to be made a rule of one particular Court, it can be made a rule of that Court only. When the submission has been made a rule of any one of the Courts, no other of them has any jurisdiction to entertain any motion respecting the arbitration or award. A *parol* submission cannot be made a rule of Court, not even by consent.

The submission may be made a rule of Court by either party, and at any time, whether before or after the award has been made, whether he has possession of the award or not, and whether his object be to enforce or to impeach the award, and it may be made a rule of Court with a view to enforcing the award, although the time for applying to set it aside has elapsed.

In support of the motion to make the submission a rule of Court, when such submission has been made by agreement, an affidavit must be made of the due execution of the instrument of submission. Also, when it is necessary to make any enlargements of the time for the making of the award (see clause 6 in the form of submission in the Appendix) a part of the rule of the Court, there should be an affidavit that the same has been duly made. The motion to make the submission a rule of Court is a motion of course, and absolute in the first instance. It may be made a rule of Court in vacation as well as in term time. On production of the affidavit and submission the judge will grant his fiat for a rule. No notice need be given to the other side.

104.—It will be observed that we have hitherto given a somewhat ample account of the preliminaries of an arbitration, and that we have mentioned some matters—such as, for instance, moving to make the submission a rule of Court—which our readers ought not to attempt to carry out without professional assistance. Our object has been to give some idea of the form which in their commencement the proceedings should take, and to show how easy it is to make the submission a rule of Court if a few simple precautions have been adopted in the first instance

The advantage of having the proceedings so shaped that the submission may be made a rule of Court, fully justifies the space which we have taken up in endeavouring to point out how this may be done. By making the submission a rule of Court, the Court obtains a summary jurisdiction over the proceedings, and can enforce the award, set the award aside, or send it back to the arbitrator, and the process by which the assistance of the Court is obtained in these cases is speedy and inexpensive. Indeed, although it would be possible to effect some of the ends thus obtained by tedious and costly proceedings, it would not be possible to accomplish others by any other means.

105 —By the 11th section of the Common Law Procedure Act, 1854, if parties agree in writing to refer existing or future differences to arbitration, and any one or more of such parties, or any person claiming under him or them, afterwards bring an action or suit in respect of such differences against any of the others of them, or anyone claiming under him or them, the Court or a judge has power to stay the proceedings in such action or suit. An application may be made under the section before the agreement to refer has been made a rule of Court. It should be noticed that the power vested in the Court or a judge by this section is discre-

tionary, and that so far is it from depriving the Courts, or allowing the parties to deprive the Courts, of any jurisdiction, that it actually gives them a jurisdiction which they would not otherwise have.

106.—It is a rule of law that agreements which ‘oust the Courts of their jurisdiction’ are void. There are cases which at first sight may appear to be inconsistent with this doctrine, but upon close examination it will be found that the inconsistency is only apparent. Instances of this kind of cases frequently occur in building contracts, but in these contracts the agreement to refer to arbitration generally amounts to a condition precedent, and in these, as in all other cases of conditions precedent, the action is not maintainable till after performance. It is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, in case any should be sustained, or the time for paying it, or any matter of a similar kind which does not go to the root of the action. The general policy of the law does not prevent parties ‘from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration.’* But ‘the law will not permit a person who enters into a binding contract to say in another clause that he will not be liable to be sued for a breach of it.’† ‘If I covenant with A to do certain acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, the latter covenant does not prevent [A] the covenantee from bringing an action.’ But ‘if I covenant with A, that if I do or omit to do a certain act, then I will pay to him such a sum as B shall

* Per Lord Cranworth, 5 H. L. Ca , 847 , Broom’s Commentaries, p 44

† Per Baron Martin, 11 Exch , 534.

award as the amount of damages sustained by him ; then until B has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen.* In other words, no obligation attaches until the amount has been settled by the referee.†

An absolute covenant, that in the happening of a certain event no action whatever shall be brought, would, in conformity with what has been above said, clearly be void ‡ And it would seem that the addition of a covenant not to sue would vitiate an agreement to refer future disputes to arbitration.§

107.—The first step after the submission is entered into is to obtain an ‘appointment,’ as the notice of the meetings is termed, from the arbitrators. This should be served on the opposite party or his attorney, if he appears by one. The Court might set aside an award, if notice of the meetings, or of attendance by counsel, were not given, provided, of course, the objection has not been waived

108.—The mode of conducting the reference must in general be left to the arbitrator, who has a discretion in the matter. Much the same order is usually followed as in the case of a trial at *Nisi Prius*, but this is, of course, sometimes departed from

All of several joint arbitrators should attend the reference, and the evidence should be taken in their joint presence, or the Court may set aside the award. Joint arbitrators should communicate and agree together before signing the award. One of them cannot delegate his authority to another, and if this is done the award may be set aside.

* Per Lord Cranworth, 5 H. L. Ca., 848.

† Broom’s Commentaries, p. 44

‡ *Ibid*, p. 45

§ *Lee v. Page*, 30 L. J., Ch., 857.

109.—Should there exist any agreement between either of the parties and the arbitrator touching the subject-matter of the reference, likely to bias or affect the judgment of the arbitrator, it should be disclosed, or a Court of Equity may interpose. In the case of *Kimberley v. Dick** a building contract contained the usual clause, appointing the Architect arbitrator in respect of extra works, the Architect had guaranteed to his employer that the total cost should not exceed a certain sum, but that fact had not been disclosed to the builder at the time he signed the contract. Lord Romilly, M.R., held that the guarantee was a material fact tending to influence the Architect's decision, and as it was not disclosed to the builder he was not bound by the submission to the Architect's arbitration, and the Court would perform the part of arbitrator in the matter.

110.—An arbitrator may make use of the judgment of another, and the opinion of that person is his if he chooses to adopt it, and he may obtain professional assistance in drawing up the award in order that it may be good in point of form.

111.—The appointment of the umpire should not be decided by chance, if so decided the Court will in general set aside the award. But they would not do so if the parties assented to the appointment with a knowledge of all the circumstances under which the choice was made. It is not necessary to affix any stamp to the appointment of the umpire.

112.—With regard to the substance of the award, any form of words that amounts to a decision of the questions referred will be good as an award. No technical expressions are necessary, but care should be taken that the award is pre-

* *Kimberley v. Dick*, L. R., 13 Eq., 1, 41 L. J., Ch., 38.

cise, clear and conclusive. It is not necessary to the validity of the award that there should be any introductory recitals. The award will be good although the arbitrator neglects to set out his authority, either by setting out the submission or in any other manner. But though such recitals are not essential, it is advisable that they should be made, in order, in many cases, to explain the award, and that they who peruse it may see on the face of the instrument that the arbitrator had authority to award as he has done, and that he has fully performed his duty. But though no particular form would be otherwise necessary, if the submission directs a certain form to be used the arbitrator must follow the directions contained in the submission, for instance, if the submission directs that the award should be under the hand and seal of the arbitrator, an award in writing only would be insufficient. If the submission is silent as to form, the arbitrator may make his award with such formalities as he pleases. Unless prescribed by the submission, the award need not be in writing, for a verbal award is perfectly valid. Even when the submission required that the award was to be made and ready to be delivered by a certain day, a parol award was held good, for a parol award is capable of oral delivery.

Some of the ordinary forms of awards will be found in the Appendix, p. 227

113.—By the Stamp Act 1870 a duty is imposed on all awards in writing *

* When the amount or value of the matter in dispute does not exceed £5, 3d. When it exceeds £5 but does not exceed £10, 6d. Above £10 and not exceeding £20, 1s. Above £20 and not exceeding £30, 1s 6d. Above £30 and not exceeding £40, 2s. Above £40 and not exceeding £50, 2s 6d. Above £50 and not exceeding £100, 5s. Above £100 and not exceeding £200, 10s. Above £200 and not exceeding £500, 15s. Above £500 and not exceeding £750, £1. Above £750 and not exceeding £1000, £1 5s. And when it exceeds £1000, and in every other case not above provided for, £1 15s.

114.—The arbitrator's power over the costs of the reference depends entirely on the terms of the submission. When there is no cause in Court, and nothing is said about costs in the submission, the arbitrator has no power over them.

115.—An award for the payment of money creates a debt for which an action may be brought in any Court of Law, and which will be sufficient to support a petition for adjudication of bankruptcy. But, as we have seen, when the submission is made a rule of Court, the performance of the award may be enforced summarily.

An action will not lie against an arbitrator, or against a person appointed by others to determine differences between them, for not exercising reasonable care and skill in coming to a decision. This assumes bona fides on the part of the arbitrator. It has been decided that in ascertaining the amount to be paid for extras, and in measuring up additions and deductions, an Architect performs the functions of an arbitrator, and that an action will not lie against him at the suit of the builder for not exercising due care and skill in performing them.*

* *Stevenson v. Watson*, 4 C. P. D., 148, 48 L. J., C. P. D., 318

CHAPTER XV.

- 116 — DILAPIDATIONS — VOLUNTARY AND PERMISSIVE WASTE
 117 —Liability of tenants for life 118 —Liability of tenants for
 years. 119 —Accidental fire 120 —Covenants to repair 121
 —Measure of damages 122 —The right to light. 123.—The
 right to prospect. 124.—Party walls.

WE have had grave doubts as to the advisability of offering any remarks on the three subjects noticed in the following chapter —Dilapidations, Ancient Lights, and Party Walls. We have been assured that questions on one or other of these points frequently occur, and that consequently a few remarks on them would be of service to Architects. That such questions do constantly arise we feel sure, but we are not so sure that we can in the space of the present work impart to our readers any profitable knowledge on the subject. It was necessary for the comprehension of the special subject treated in this little work that we should first endeavour to impart to our readers some instruction in the elementary principles of contracts generally, but that instruction would hardly fit them for the comprehension of the three subjects above-mentioned; and, indeed, to properly introduce them a separate treatise would be necessary in order to effect any good practical purpose. On the other hand, such a book would of necessity be of too technical a character for the ordinary unprofessional reader. However, as we are assured that a few remarks would be acceptable, we offer the following, which we have endeavoured to make as general as possible, for what they

may be worth. Those on dilapidations we have taken from Smith's 'Landlord and Tenant,' and for those on ancient rights and party walls we are mainly indebted to 'Gale on Easements.'

116.—The technical term for dilapidations is 'waste' Waste may be either *voluntary* or *permissive*. Voluntary waste consists in doing something which the tenant is prohibited by law from doing. Permissive waste is allowing something to happen which he is bound by law to prevent

117.—Tenants for life are guilty of voluntary waste if they fell timber except for purposes of repair, if they pull down or damage houses, if they open mines; or if they destroy heirlooms incident to the inheritance. A tenant for life is guilty of permissive waste if he allows the buildings on the estate to decay. These rules may be varied by an express contract.

118.—With regard to voluntary waste, tenants for years and at will are in the same position as tenants for life. It is generally true that a lessee for years may not change the nature of the thing demised.

With regard to permissive waste, the liabilities of a tenant for years, or from year to year, seem less than those of a tenant for life of the freehold. It is clear that a tenant from year to year is bound to do no more than keep the house wind and water tight. And, on the other hand, the landlord of a tenant from year to year is not, in the absence of any express contract, under any obligation to repair the premises. Nor is there any implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation. With regard to lessees for years, so seldom does it happen that the lease does not contain stipulations on the subject, that the question of their liabilities, in the absence of an express

agreement, rarely, if ever, occurs. The law upon the subject is somewhat unsettled, but it would seem that, in the absence of any express agreement, the liability of a tenant for a term of years is just the same as that of a tenant from year to year, and no greater.

119.—With regard to accidental fires, the 14 Geo. III., c. 78, s. 86, contains a provision that no action, suit, or process whatever shall be laid, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin. It has been decided that this section does not apply where a fire is caused by negligence. Such is the law in the absence of any express agreement, but this would not apply if the lease contained an express stipulation, such as a covenant to repair.

120.—With regard to express covenants, they must differ according to the nature of the property tenanted. The expressions which have been at different times made use of and the constructions which have been put upon those expressions by the Courts, are so numerous that it would be useless to attempt to enumerate them, but we will endeavour in a few remarks to give the general spirit of some of the decisions. When there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken, and a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one. The meaning of the expression 'good repair' has relation to the age of the building, and is different with respect to old and to new premises. When, however, a tenant covenants to *keep* the premises in good repair, and to deliver them up at the expiration of the tenancy in good repair,

order, and condition, he is bound to *put* them into good repair, and is not justified in keeping them in bad repair because he found them in that condition. Even in this case, however, the extent of the repairs is to be measured by the age and class of the buildings.

When a lessee covenanted to repair the demised premises, the farm-house and buildings being previously put in repair and kept in repair by the landlord, it was held that these words amounted to an absolute and independent covenant on the part of the landlord to put the premises in repair. When the tenant covenanted to keep the premises in repair, the same being first put into repair by the landlord, it was held that the repairing by the landlord was a condition precedent to the obligation on the tenant to keep the premises in repair.

121.—In an action brought by the landlord, when the term is unexpired, for breach of a covenant to repair, the measure of the amount of damages is the injury done to the market value of the landlord's reversion.

122.—The use, by means of windows in a house or otherwise, of light and air passing over land which is not encumbered with buildings confers no right unless it has been continued during twenty years. The strict right of property entitles the owner to so much light and air only as falls perpendicularly on his land, the passage of these elements over adjoining lands affords in itself no evidence that such a right has, so to speak, been enlarged in a lateral direction and become what is termed in law *an easement*. The right to the reception of light and air in a lateral direction, without obstruction, is an easement. A man may build to the very extremity of his own land, and no action can be maintained against him for disturbing his neighbour's privacy by opening windows which overlook the adjoining property ;

but it is competent to such neighbour to obstruct the windows so opened by building against them, or erecting a hoarding against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement. He must, however, in doing this be careful not to trespass on his neighbour's property by resting any part of the building or hoarding on or against it. If twenty years is once suffered to elapse, his long acquiescence becomes evidence, as in the case of other easements, of a title by the assent of the party whose land is subject to the easement. We thus see that the expression 'ancient lights' means lights which have been enjoyed during twenty years

The right to the use of light may thus be acquired, not only for the ordinary purposes of domestic life, but for the convenience of trade or manufactures. The extent of the right acquired by the use will be proportioned to the actual amount of enjoyment had during the requisite period, which, if doubtful, is a question of fact to be determined by a jury.

As an instance, it has been held that, if a man has acquired a right to light sufficient for the purposes of a malt-house, he cannot, should he change the malt-house into a dwelling-house, maintain an action against his neighbour for obstructing the light to the dwelling-house, if sufficient light be left for the purposes of a malt-house. Should the enjoyment of the light and air for even twenty years or more have been enjoyed by some written agreement or deed, then the right cannot be prescribed for. In fact it is then governed and determined wholly by the terms of the written agreement.

By the Prescription Act, 2 and 3 W. IV., c. 71, s. 3, it is enacted, 'That when the access and use of light to and for

any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some contract or agreement made or given for that purpose by deed or writing.'

An old custom of the City of London authorising the building on ancient foundations, so as to obstruct a neighbour's ancient lights, is abolished by this enactment.

The Metropolitan Building Act, enabling the owner to rebuild a party wall, on making good all damage, does not authorise him in so doing to obstruct the ancient lights of the adjoining owner

123 —The law of England recognises no right to prospect, except by express grant or covenant. The squares in London afford instances of the existence of this right when so created

124 —The common user of a wall adjoining lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common.

When the precise extent of land originally belonging to each owner can be ascertained, the presumption of a tenancy in common does not arise, but each party is the owner of so much of the wall as stands upon his own land. And, unless prevented by some easement having been acquired, either party would be at liberty to pare away, or even entirely to remove, his portion, notwithstanding the other half might be unable to stand without the support of it. At the utmost the fact of the close union of the walls would only impose a duty of greater caution than might otherwise be required in removing the materials.

In general, however, party walls will be found to be built on the common property of the two adjoining owners, and to be the property of both, and should there be proof of a common user, such will be presumed to be the case.

In the metropolis party walls are regulated by the provisions of the Building Act, 18 and 19 Vic, c 122, which will be found in the Appendix. It seems hardly necessary to do more than to refer to them here, as the provisions are so specific as sufficiently to explain themselves to any practical Architect.

APPENDIX.

APPENDIX.

WHEN this work was first published, it was necessary to refer to a variety of statistics in order to find out the provisions affecting building operations carried on elsewhere than in the metropolis, and as there was no work on the subject adapted for the use of non-professional readers, we thought it advisable to group those provisions together in the Appendix. Those statutes are now repealed, and the provisions scattered over them are consolidated by the Public Health Act, 1875, and we cannot do better than refer those of our readers who may desire information on the subject to Mr. J. V. Vesey Fitzgerald's book on the Act, which is adapted as well for laymen as lawyers. One word of caution is necessary both to Architects and builders—their contracts with the authorities created by the Act should be under the seal of the Authority. The contract may have been performed thoroughly well and conscientiously, but if the Local Board or other sanitary authority, who have had the benefit of the work, resist a claim for payment on the ground that their seal has not been affixed to the contract, neither a Court of Law * nor Equity † will be able to afford any relief.

THE METROPOLIS MANAGEMENT ACTS.

An acquaintance with the following provisions contained in the Metropolis Management Acts will be found advisable before entering into any contract with the Metropolitan Board of Works, or any District Board or Vestry, or before commencing building operations, within the limits of the Metropolis, under any other contract.—

Metropolis Local Management Act, 1855.

CXLIX. The Metropolitan Board of Works, and every District Board and Vestry, may enter into all such Contracts as they may think necessary for carrying this Act into Execution, and every such Contract for Works or Materials whereof the Value or Amount exceeds Ten Pounds shall be in Writing or Print, or

Power to Boards and Vestries to enter into Contracts for carrying Act into Execution.

* *Frend v Dennett*, 27 L. J., C. P., 314. *Hunt v The Wimbledon Local Board*, 4 C. P. D. 48, 48 L. J., C. P. D., 207.

† *Frend v Dennett*, 5 L. T. (N. S.), 73.

partly in Writing and partly in Print, sealed with the Seal of the Board or Vestry, and every Contract so entered into, and duly executed by the other Parties thereto, shall be binding on the Board or Vestry and their Successors, and upon all other Parties thereto

Power to compound for Penalties in respect of Breach of Contracts

Provided always, that it shall be lawful for any such Board or Vestry to compound with any Contractor or other Person in respect of any Penalty incurred by reason of the non-Performance of any Contract entered into as aforesaid, whether such Penalty be mentioned in any such Contract or in any Bond or otherwise, for such Sum of Money or other Recompense as to the Board or Vestry may seem proper

Metropolitan Board of Works, District Boards, and Vestries to keep Copies of Contracts entered into by them.

Metropolis Local Management Act, 1855

Minutes of Proceedings of Metropolitan and District Boards, and of Vestries, to be entered.

LX. Entries of all Proceedings of the Metropolitan Board of Works and every such District Board, and of any such Vestry, with the Names of the Members who attend each Meeting, shall be made in Books to be provided and kept for that Purpose, under the Direction of the Board or Vestry, and shall be signed by the Members present, or any Two of them, and all Entries purporting to be so signed shall be received as Evidence, without Proof of any Meeting of the Board or Vestry having been duly convened or held, or of the Presence at any such Meeting of the Persons named in any such Entry as being present thereat, or of such Persons being Members of the Board or Vestry, or of the Signature of any Person by whom any such Entry purports to be signed, all which Matters shall be presumed until the Contrary be proved, and every such Board and Vestry shall provide and keep Books in which shall be entered true and regular Accounts of all Sums of Money received and paid by them or under their Authority, and of all Liabilities incurred by them, and of the several Purposes for which such Sums of Money are received and paid and such Liabilities incurred, and Copies of all Contracts entered into by any such Board or Vestry

Penalty on Officers, &c, being interested in Contracts, or exacting Fees

LXIV No Officer or Servant of the Metropolitan Board, or of any District Board, or any such Vestry, shall be in anywise concerned or interested in any Contract or Work made with or executed for such Board or Vestry, and if any such Officer or Servant be so concerned or interested, or, under colour of his Office or Employment, exact, take, or accept any Fee or Reward whatsoever, other than his proper Salary, Wages, and Allowances, he shall be incapable of afterwards holding or continuing in any Office or Employment under such Board or Vestry, and shall

forfeit and pay the Sum of Fifty Pounds, which may be recovered by any Person, with full Costs of Suit, by Action in any of the Superior Courts of Law, provided that no Person, being a Shareholder of any Joint-Stock Company, shall be prevented from being employed as an Officer or Servant by reason of any Contract between such Company and such Board or Vestry, or of any Work executed by such Company

LXXV. It shall not be lawful to erect any House or other Building, in any Parish mentioned in Schedule (A) to this Act, or in any District mentioned in Schedule (B) to this Act, or to rebuild any House or Building within any such Parish or District which has been pulled down to or below the Floor commonly called the Ground Floor, or to occupy any House or Building so newly built, unless a Drain and such Branches thereto, and other connected Works and Apparatus and Water Supply as hereinbefore mentioned be constructed and provided to the Satisfaction of the Surveyor of the Vestry of such Parish or Board of Works for such District, of such Materials, of such Size, at such Level, and with such Fall as they may direct, so that the same shall be available for the Drainage of the Lowest Floor of such House or Building, and of its several Floors or Stories, and also of its Areas, Water-closets, Privies, and Offices (if any), which Drain shall lead from such House or Building to such Sewer, already made or intended to be constructed near thereto, as the Vestry or Board shall direct and appoint, or if there be no such Sewer existing or intended to be constructed within One Hundred Feet of any Part of the intended Site of such House or Building, then to such covered Cesspool or other Place, not being under any Dwelling house, the Vestry or Board shall direct, and whenever any House or Building is rebuilt as aforesaid, the Level of the Lowest Floor of such House or Building shall be raised sufficiently to allow of the Construction of such a Drain and such Branches thereto, and other Works and Apparatus as are hereinbefore required, and for that Purpose the Levels shall be taken and determined under the Direction of the Vestry or District Board

No House to be built without Drain to the Satisfaction of the Vestry or District Board.

LXXVI Before beginning to lay or dig out the Foundation of any new House or Building within any such Parish or District, or to rebuild any House or Building therein, and also before making any Drain for the Purpose of Draining directly or indirectly into any Sewer under the Jurisdiction of the Vestry or Board of or for any such Parish or District, Seven Days' Notice in Writing shall be given to the Vestry or Board by the Person intending to build or rebuild such House or Building or to make such Drain, and every such Foundation shall be laid at such

Notice of Building to be given to the Vestry or District Board before commencing the same

Level as will permit the Drainage of such House or Building in compliance with this Act, and as the Vestry or Board shall order, and every such Drain shall be made in such Direction, Manner, and Form, and of such Materials and Workmanship, and with such Branches thereto, and other connected Works and Apparatus and Water Supply as hereinbefore mentioned, and as the Vestry or Board shall order, and the making of every such Drain shall be under the Survey and Control of the Vestry or Board, and the Vestry or District Boards shall make their Order in relation to the Matters aforesaid, and cause the same to be notified to the Person from whom such Notice was received within Seven Days after the Receipt of such Notice, and in Default of such Notice, or if such House, Building, or Drain, or Branches thereto, or other connected Works and Apparatus and Water Supply, be begun, erected, made, or provided in any Respect contrary to any Order of the Vestry or Board made and notified as aforesaid, or the Provisions of this Act, it shall be lawful for the Vestry or Board to cause such House or Building to be demolished or altered, and to cause such Drain or Branches thereto, and other connected Works and Apparatus and Water Supply to be relaid, amended, or remade, or, in the event of Omission, added, as the Case may require, and to recover the Expenses thereof from the Owner thereof in the Manner herein-after provided.

Power to branch
Drains into
Sewers con-
structed by
Metropolitan
Board, or any
Vestry or Dis-
trict Board,
under certain
Regulations

LXXVII It shall be lawful for any Person, at his own Expense, to make or branch any Drain into any of the Sewers vested in the Metropolitan Board of Works or any Vestry or District Board under this Act, such Drain being of such a Size, and of such Conditions, and branched to such Sewer, in such a Manner and Form of Communication in all Respects as the Vestry or Board shall direct or appoint, and in case any Person make or branch any Drain into any of the said Sewers so vested in the Vestry or Board, or authorized to be made by them under this Act, of a larger Size, or of different Conditions, or in a different Manner and Form of Communication than shall be directed or appointed by the Vestry or Board, every Person so offending shall for every such Offence forfeit a Sum not exceeding Fifty Pounds

Power to Metro-
politan Board or
Vestry or Dis-
trict Board to
branch private
Drains into
Sewers, at the
Expense of the
Party to whom
they belong.

LXXVIII Whenever it is necessary to open any Part of the Pavement of any Street or public Place for the Purpose of making or branching any private Drain into any of the Sewers or Drains vested in the Metropolitan Board of Works, or any Vestry or District Board under this Act, or authorized to be made by them under this Act, it shall be lawful for the Vestry or Board, in case they think fit so to do, to make so much and such Part of

such private Drain, and also to construct so much and such Part of the Work necessary for branching the same into the public Sewers as shall be under or in any Street, and to recover the Expenses incurred thereby from the Owner of the House, Building, or Ground to which such private Drain belongs, in the Manner herein-after provided

LXXIX It shall be lawful for any such Vestry or Board to contract and agree with the Owners or Occupiers of any Houses, Buildings, or Ground that any Drains required to be made, altered, or enlarged by such Owners shall be constructed, made, altered, and enlarged by the Vestry or Board, and the Cost Price of making, altering, or enlarging such Drains, as certified by the Surveyor of the Vestry or Board, shall be repaid by the Owner or Occupier so agreeing to the Vestry or Board, and in Default of Payment the same may be recovered in the Manner herein-after provided.

Vestry or District Board may agree to make House Drains at the Expense of Owners or Occupiers.

Metropolis Local Management Act, 1855.

LXXIII. If any House, or Building, whether built before or after the Commencement of this Act, situate within any such Parish or District, be found not to be drained by a sufficient Drain communicating with such Sewer, and not emptying itself into the Sewer to the Satisfaction of the Vestry or Board of such Parish or District, and if a Sewer of sufficient Size be within One Hundred Feet of any Part of such House or Building, on a lower Level than such House or Building, it shall be lawful for the Vestry or Board, at their Discretion, by Notice in Writing, to require the Owner of such House or Building forthwith, or within such reasonable Time as may be appointed by the Vestry or Board, to construct and make from such House or Building into any such Sewer a covered Drain, and such Branches thereto, of such Materials, of such Size, at such Level, and with such Fall as shall be adequate for the Drainage of such House or Building, and its several Floors or Stories, and also of the Areas, Waterclosets, Privies, and Offices (if any) used for conveying the Soil, Drainage, and Wash therefrom into the said Sewer, and to provide fit and proper paved or impermeable sloped Surfaces for conveying Surface Water thereto, and fit and proper Sinks, and fit and proper syphoned or otherwise trapped Inlets and Outlets for hindering Stench therefrom, and fit and proper Water Supply and water-supplying Pipes, Cisterns, and Apparatus for serving the same, and for causing the same to convey away the Soil, and fit and proper service Traps and expanding Inlets and other Arrangements as may appear to the Vestry or Board or to their Officers requisite to secure the safe and proper working of the said Drain, and to prevent the same

Vestry or District Board in certain may compel Owner, &c., of House to construct Drains into the common Sewer

from obstructing or otherwise injuring or impeding the Action of the Sewer to which it leads, and it shall be lawful for the said Vestry or Board to cause the said Works to be inspected while in Progress, and from Time to Time during their Execution to order such reasonable Alterations therein, Additions thereto, and Abandonment of Part or Parts thereof, as may to the Vestry or Board or their Officers appear, on the fuller Knowledge afforded by the opening of the Ground, requisite to secure the complete and perfect working of such Works,

Penalty on
Owner, &c., for
Neglect.

And if the Owner of such House or Building neglect or refuse, during Twenty-Eight Days after the said Notice has been delivered to such Owner, or left at such House or Building, to begin to construct such Drain and other Works aforesaid, or any of them, or thereafter fail to carry them on, or to complete them with all reasonable Despatch, it shall be lawful for the said Vestry or Board to cause the same to be constructed and made, and to recover the Expenses to be incurred from such Owner in the Manner herein-after provided

Provision for
combined Drain-
age of Blocks of
Houses

LXXIV If it appear to the Vestry or Board of any Parish or District that a Group or Block of contiguous Houses, or of adjacent detached or semi-detached Houses, may be drained or improved more economically and advantageously in Combination than separately, and a Sewer of sufficient Size already exist, or be about to be constructed within One Hundred Feet of any Part of such Group or Block of Houses, whether contiguous, detached, or semi-detached, it shall be lawful for such Board or Vestry to order that such Group or Block of Houses be drained or improved as herein-before provided by a combined Operation.

Metropolis Management Act, 1862 (25—26 Vict., c. 102).

Buildings pro-
jecting beyond
the general Lane,
when taken
down to be set
back.

LXXIV In case any Building, situated within any of the Parishes or Districts, or Places comprised in the Schedules of the firstly-recited Act [that is to say, within the District over which the Metropolitan Board of Works has Jurisdiction], which shall in any Part thereof project beyond the general Line of the Street in which the same may be situate, or beyond the Front of the Building Wall or Railing on either Side thereof, shall at any time be taken down to an Extent exceeding One-Half of such Building, such Half to be measured in Cubic Feet, or shall be destroyed by Fire or other Casualty, or demolished, pulled down, or removed from any other Cause, to the Extent aforesaid, it shall be lawful for the Metropolitan Board of Works to require the same to be set back to such a Lane and in such a Manner for the Improvement of any Street, as the said Board shall direct,

provided that the said Board shall make Compensation to the Owner of such Building for any Damage and Expenses which he may sustain and incur thereby, provided also that this Section shall not apply to any Building in the Places mentioned in Schedule (C) to the Metropolis Local Management Act [those are, the Close of the Collegiate Church of St Peter, the Charterhouse, Inner Temple, Middle Temple, Lincoln's Inn, Gray's Inn, Staple Inn, and Furnival's Inn] which does not abut upon any Public Street or Place

LXXV. . Be it enacted, that no Building, Structure, or Erection shall without the Consent in Writing of the Metropolitan Board of Works be erected beyond the general Line of Buildings in any Street, Place, or Row of Houses in which the same is situate, in case the Distance of such Line of Buildings from the Highway does not exceed Fifty Feet, or within Fifty Feet of the Highway when the Distance of the Line of Buildings therefrom amounts to or exceeds Fifty Feet, notwithstanding there being Gardens or Vacant Spaces between the Line of Buildings and the Highway, such general Line of Buildings to be decided by the Superintending Architect to the Metropolitan Board of Works for the Time being, and in case any Building, Structure, or Erection be erected, or be begun to be erected or raised without such Consent, or contrary to the Terms and Conditions on which the same may have been granted, it shall be lawful for the Vestry of the Parish or the Board of Works for the District in which such Building or Erection is situate, to cause to be made Complaint thereof before a Justice of the Peace, who shall thereupon issue a Summons requiring the Owner or Occupier of the Premises, or the Builder or Person engaged in any Works contrary to this Enactment, to appear at any Time or Place to be stated in the Summons to answer such Complaint, and if at the Time and Place appointed in such Summons, the said Complaint shall be proved to the Satisfaction of the Justice before whom the same shall be heard, such Justice shall make an Order in Writing on such Owner or Occupier, Builder or Person, directing the Demolition of any such Building or Erection, or so much thereof as may be beyond the said general Line so fixed as aforesaid, within such Time as such Justice shall consider reasonable, and shall also make an Order for the Payment of the Costs incurred up to the Time of Hearing, and in Default of the Building or Erection complained of being demolished within the Time limited by the said Order, the said Vestry or Board shall forthwith enter the Premises to which the Order relates and demolish the Building or Erection complained of, and do whatever may be necessary to execute the said Order, and may also remove the Materials to a convenient Place, and

Mode of Proceeding with regard to Buildings beyond Line of Street

subsequently sell the same as they think fit, and all Expenses incurred by the said Vestry or Board in carrying out the said Order, and in Disposal of the said Materials, may be recovered by the said Vestry or Board from the Owner or Occupier of the said Premises, or the Builder or Person engaged in the Work, either by Action at Law or in a summary Manner before a Justice of the Peace, at the Option of the said Vestry or Board, in Manner provided by the Two Hundred and Twenty-Seventh Section of the [Metropolis Local Management Act, 1855], for the Recovery of Penalties.

Conditions as to
Buildings
beyond Line of
Street.

LXXVI The Metropolitan Board may, in giving Consent for any Erection beyond the regular Line of the Buildings in any Street, annex any Condition to the Consent given by the Board, and in case such Erection shall not be made in accordance with the Consent of the Board, or be in any Manner altered or raised without their Consent, the Board may enter and demolish or alter the Buildings or Structure, or any Part thereof, and recover all Expenses, or may impose any Penalty not exceeding Forty Shillings, to be summarily recovered, for every Day during which any Building or Structure being a Contravention of such Condition shall exist after Notice from the said Board or any Officer of the Board to remedy the Complaint

Metropolis Local Management Act, 1855 (18—19 Vict, c 120).

Buildings not to
be made over
Sewers without
Consent

CCIV No Building shall be erected in, over, or under any Sewer vested in the Metropolitan Board of Works, or in any Vestry or District Board, without their Consent first obtained in Writing, and if any Building be erected contrary to this Provision, the Board or Vestry in whom such Sewer is vested may demolish the same, and the Expenses incurred thereby shall be paid by the Person erecting such Building.

Metropolis Management Act, 1862 (25—26 Vict., c. 102).

Height of
Buildings in
certain Streets

LXXXV No Building except a Church or Chapel shall be erected on the Side of any new Street of a less Width than Fifty Feet, which shall exceed in Height the Distance from the External Wall or Front of such Building to the opposite Side of such Street, without the Consent in Writing of the Metropolitan Board of Works, nor shall the Height of any Building so erected be at any Time subsequently increased so as to exceed such Distance without such Consent, and in determining the Height of such Building the Measurement shall be taken from the Level of the Centre of the Street immediately opposite the Building up to the Parapet or Eaves of such Building, and every Person commit-

ting any Offence under this Enactment shall be liable to a Penalty of Five Pounds, and in case of a continuing Offence to a further Penalty of Forty Shillings for every Day during which such Offence shall continue after Notice from the said Board, to be recovered by summary Proceedings.

BYE LAWS.

Metropolis Local Management Act, 1855 (18—19 Vict, c 120).

CCII. The Metropolitan Board of Works, and every District Board and Vestry respectively, may from Time to Time make, alter, and repeal Bye Laws for all or every of the Purposes following, (that is to say) for regulating the Plans, Level, Width, Surface Inclination, and the Material of the Pavement and Roadway of new Streets and Roads, and the Plans and Levels of Sites for Building, and for regulating the Dimensions, Form, and Mode of Construction, and the keeping, cleansing, and repairing of the Pipes, Drains, and other Means of communicating with Sewers, and the Traps and Apparatus connected therewith.

CCIII. All Bye Laws made and confirmed as aforesaid in pursuance of this Act shall be printed and hung up in the principal Office of the Board or Vestry, and be open to public Inspection without Payment, and Copies thereof shall be delivered to any Person applying for the same on Payment of such Sum, not exceeding Twopence, as the Board or Vestry shall direct, and such Bye Laws, when so published, shall be binding upon, and shall be observed by all Parties, and shall be sufficient to justify all Parties acting under the same.

DEFINITION OF "METROPOLIS."

Metropolis Local Management Act, 1855.

CCI. In the Construction of this Act, "the Metropolis" shall be deemed to include the City of London, and the Parishes mentioned in the Schedules (A), (B), and (C) to this Act, the City of London shall be deemed to include all Parts now within the Jurisdiction of the Commissioners of Sewers of the City of London.

This definition is substantially the same as that given in sec. 112 of the Act passed to amend the above—the Metropolis

Management Act, 1862. As the Schedules (A), (B), and (C) are somewhat lengthy, and as we believe that the idea generally entertained as to the limits of the Metropolis will prove sufficient for all practical purposes, we have not set them out, contenting ourselves with informing our readers where they may obtain further information should they desire to do so.

THE
METROPOLITAN BUILDING ACT, 1855.
18 AND 19 VICT, CAP. CXXII.

WHEREAS it is expedient that the Laws relating to Buildings in the Metropolis and its Neighbourhood should be amended Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows, (that is to say,)

PRELIMINARY

I. This Act may be cited for all Purposes as "The Metropolitan Short Title Building Act, 1855"

II This Act shall, except in cases where it is otherwise expressly provided, come into operation on the First Day of *January* One thousand eight hundred and fifty-six Commencement
of Act

III In the Construction of this Act (if not inconsistent with the Context) the following Terms shall have the respective Meanings herein-after assigned to them, (that is to say,) Interpretation
of certain Terms
in this Act

"The Treasury" shall mean the Commissioners of Her Majesty's Treasury

"Public Building" shall mean every Building used as a Church, Chapel, or other Place of public Worship, also every Building used for Purposes of public Instruction, also every Building used as a College, public Hall, Hospital, Theatre, public Concert Room, public Ball Room, public Lecture Room, public Exhibition Room, or for any other public Purposes

"External Wall" shall apply to every outer Wall or vertical Enclosure of any Building not being a Party Wall

"Party Wall" shall apply to every Wall used or built in order to be used as a Separation of any Building from any other Building, with a view to the same being occupied by different Persons :

"Cross Wall" shall apply to every Wall used or built in order to be used as a Separation of one Part of any Building from another Part of the same Building, such Building being wholly in One Occupation.

"Party Structure" shall include Party Walls, and also Partitions, Arches, Floors, and other Structures separating Buildings, Stories, or Rooms which belong to different Owners, or which are approached by distinct Staircases or separate Entrances from without

The "Area" of every Building shall be deemed to be the Superficies of a horizontal Section of such Building made at the Point of its greatest Surface, including the External Walls and such Portion of the Party Walls as belong to the Building, but excluding any attached Building the Height of which does not exceed the Height of the Ground Story

"The Base of the Wall" shall mean the Course immediately above the Footings :

"Owner" shall apply to every Person in possession or receipt either of the whole or of any Part of the Rents or Profits of any Land or Tenement, or in the Occupation of such Land or Tenement other than as a Tenant from Year to Year or for any less Term, or as a Tenant at Will .

"Builder" shall apply to and include the Master Builder or other Person employed to execute or who actually executes any Work upon any Building

"District Surveyor" shall mean every such Surveyor who is appointed in pursuance of this Act, or whose Appointment is hereby confirmed, and shall include any Deputy or Assistant Surveyor appointed under this Act

In all Cases in which the Name of an Officer having local Jurisdiction in respect of his Office is referred to without Mention of the Locality to which the Jurisdiction extends, such Reference is to be understood to indicate the Officer having Jurisdiction in that Place within which is situate the Building or other Subject Matter or any Part thereof to which such Reference applies

"Person" shall include "a Body Corporate."

LIMITS OF ACT.

Act to extend to all Places within Limits defined by 18 & 19 Vict. c 120.

IV. This Act shall extend to all Places within the Limits of the Metropolis as defined by an Act passed in the present Session of Parliament, intituled *An Act for the better local Management of the Metropolis*, and to all other Places to which such last-mentioned Act may be extended, unless such Places are in making such Extension expressly excepted from the Operation of this Act, but nothing herein contained shall affect the Exercise of any Powers vested by any Act of Parliament in the Commissioners of Sewers of the City of London for the Time being.

Division of Act.

V. This Act shall be divided into Five Parts :

- (1) The First Part relating to the Regulation and Supervision of Buildings :
- (2) The Second Part relating to Dangerous Structures :
- (3) The Third Part relating to Party Structures :
- (4) The Fourth Part relating to Miscellaneous Provisions .
- (5) The Fifth Part relating to the Repeal of former Acts, and to temporary Provisions.

PART I.

PART I.

REGULATION AND SUPERVISION OF BUILDINGS.

Regulation and Supervision of Buildings

VI —The following Buildings and Works shall be exempt from the Operation of the First Part of this Act .

Buildings, &c, herein named exempt from Operation of Part I of this Act

Bridges, Piers, Jetties, Embankment Walls, Retaining Walls, and Wharf or Quay Walls

Her Majesty's Royal Palaces, and any Building in the Possession of Her Majesty, Her Heirs and Successors, or employed for Her Majesty's Use or Service :

Common Gaols, Prisons, Houses of Correction, and Places of Confinement under the Inspection of the Inspectors of Prisons, and Bethlehem Hospital, and the House of Occupations adjoining :

The Mansion House, Guildhall, and Royal Exchange of the City of *London*

The Offices and Buildings of the Governor and Company of the Bank of *England* already erected, and which now form the Edifice called "The Bank of *England*," and any Offices and Buildings hereafter to be erected for the Use of the said Governor and Company, either on the Site of or in addition to and in connexion with the said Edifice

The Buildings of the *British* Museum :

The Offices and Buildings of the Honourable *East India* Company already erected, and any Offices or Buildings hereafter to be erected, for the Use of the said Company, on the Site of or in addition to such existing Offices and Buildings

Greenwich Hospital and the Buildings in the Parish of *Greenwich* vested in the Commissioners of *Greenwich* Hospital for the Purposes of the said Hospital .

All County Lunatic Asylums, Sessions Houses, and other public Buildings belonging to or occupied by the Justices of the Peace of the County or City in which the same are situated :

The Erections and Buildings authorised by an Act passed in the

Ninth Year of the Reign of His late Majesty King *George the Fourth*, for the Purposes of a Market in *Covent Garden*

The Cattle Market, with its Appurtenances, erected in pursuance of the Metropolitan Cattle Market Act, 1851.

The Buildings belonging to any Canal, Dock, or Railway Company, and used for the Purposes of such Canal, Dock, or Railway, under the Provisions of any Act of Parliament

All Buildings, not exceeding in Height Thirty Feet, as measured from the Footings of the Walls, and not exceeding in Extent One hundred and twenty-five thousand Cubic Feet, and not being Public Buildings, wholly in One Occupation, and distant at least Eight Feet from the nearest Street or Alley, whether public or private, and at the least Thirty Feet from the nearest Buildings and from the Ground of any Adjoining Owner

All Buildings not exceeding in Extent Two hundred and sixteen thousand Cubic Feet, and not being Public Buildings, and distant at least Thirty Feet from the nearest Street or Alley, whether public or private, and at the least Sixty Feet from the nearest Buildings and from the Ground of an Adjoining Owner

All Party Fence Walls and Greenhouses so far as regards the necessary Woodwork of the Sashes, Doors, and Frames

Openings made into Walls or Flues for the Purpose of inserting therein ventilating Valves of a superficial Extent not greater than Forty Square Inches, if such Valves are not nearer than Twelve Inches to any Timber or other combustible Material.

Application of Act, except Exemptions before mentioned.

VII With the Exemptions herein-before mentioned, this Act shall apply to all new Buildings, and whenever Mention is herein made of any Building, it shall, unless the contrary appears from the Context, be deemed to imply a new Building.

Building, when deemed to be new

VIII A Building shall be deemed to be new whenever the enclosing Walls thereof have not been carried higher than the Footings previously to the said First Day of *January* One thousand eight hundred and fifty-six Any other Building shall be deemed to be an old Building

Alterations of and additions to old Buildings

IX Any Alteration, Addition, or other Work made or done for any Purpose except that of necessary Repair not affecting the Construction of any External or Party Wall, in, to, or upon any old Building, or in, to, or upon any new Building after the Roof has been covered in, shall, to the Extent of such Alteration, Addition, or Work, be subject to the Regulations of this Act, and whenever Mention is herein-after made of any Alteration, Addition, or Work in, to, or upon any Building, it shall, unless the contrary

appears from the Context, be deemed to imply an Alteration, Addition, or Work to which this Act applies.

X Whenever any old Building has been taken down to an Extent exceeding One Half of such Building, such Half to be measured in Cubic Feet, the rebuilding thereof shall be deemed to be the Erection of a new Building, and every Portion of such old Building that is not in conformity with the Regulations of this Act shall be forthwith taken down Rebuilding old Buildings

XI Whenever any old Buildings are separated by Timber or other Partitions not in conformity with this Act, then, if such Partitions are removed to the Extent of One Half thereof, such Buildings shall as respects the Separation thereof be deemed to be new Buildings, and be forthwith divided from each other in the Manner directed by this Act Division of old Buildings separated by irregular Partitions.

WALLS

XII Walls shall be constructed of such Substances and of such Thickness and in such Manner as are mentioned in the First Schedule annexed hereto Structure and Thickness of Walls

RECESSES AND OPENINGS.

XIII. The following Rules should be observed with respect to Recesses and Openings in Walls Rules as to Recesses and Openings.

Recesses and Openings may be made in External Walls, provided,

1. That the Backs of such Recesses are not of less Thickness than Eight and a Half Inches, and,
2. That the Area of such Recesses and Openings do not, taken together, exceed One Half of the whole Area of the Wall in which they are made

Recesses may be made in Party Walls, provided that,

1. The Backs of such Recesses are not of less Thickness than Thirteen Inches, and
2. That every Recess so formed is arched over, and that the Area of such Recesses do not, taken altogether, exceed One Half of the whole Area of the Wall of the Story in which they are made, and
- 3 That such Recesses do not come within One Foot of the inner Face of the External Walls,

But no Opening shall be made in any Party Wall except in accordance with the Rules of this Act

The Word Area, as used in this Section, shall mean the Area of

the vertical Face, or Elevation, of the Wall, Pier, or Recess to which it refers.

MISCELLANEOUS.

As to Timber in
External Walls

XIV Loophole Frames may be fixed within One Inch and a Half of the Face of any External Wall, but all other Woodwork fixed in any External Wall, except Bressummers and Story Posts under the same, and Frames of Doors and Windows of Shops on the Ground Story of any Building, shall be set back Four Inches at the least from the external Face of such Wall.

Rules as to
Bressummers

XV The following Rules shall be observed with respect to Bressummers and Timbers

1. Every Bressummer must have a Bearing in the Direction of its Length of Four Inches at the least at each End, upon a sufficient Pier of Brick or Stone, or upon a Timber or Iron Story Post fixed on a solid Foundation, in addition to its Bearing upon any Party Wall, and the Ends of such Bressummer shall not be placed nearer to the Centre Line of the Party Walls than Four and a Half Inches
2. No Bond Timber or Wood Plate shall be built into any Party Wall, and the Ends of any Beam or Joist bearing on such Walls shall be at the least Four and a Half Inches distant from the Centre Line of the Party Walls
3. Every Bressummer bearing upon any Party Wall must be borne by a Templet or Corbel of Stone or Iron tailed through at least Half the Thickness of such Wall, and of the full Breadth of the Bressummer

Height and
Thickness of
Parapets to
External Walls.

XVI If any Gutter, any Part of which is formed of combustible Materials, adjoins an External Wall, then such Wall must be carried up so as to form a Parapet One Foot at the least above the highest Part of such Gutter, and the Thickness of the Parapet so carried up must be at the least Eight and a Half Inches, reckoned from the Level of the under Side of the Gutter Plate

Height of
Party Walls
above Roof.

XVII Every Party Wall shall be carried up above the Roof Flat or Gutter of the highest Building adjoining thereto, to such Height as will give a Distance of Fifteen Inches measured at Right Angles to the Slope of the Roof, or Fifteen Inches above the highest Part of any Flat or Gutter, as the Case may be; and every Party Wall shall be carried up above any Turret, Dormer, Lantern Light, or other Erection of combustible Materials fixed upon the Roof or Flat of any Building within Four Feet from

such Party Wall, and shall extend at least Twelve Inches higher and wider on each Side than such Erection, and every Party Wall shall be carried up above any Part of any Roof opposite thereto, and within Four Feet from such Party Wall.

XVIII. In a Party Wall no Chase shall be made wider than Fourteen Inches, nor more than Four and a Half Inches deep from the Face of the Wall, nor so as to leave less than Eight and a Half Inches in Thickness at the Back or opposite Side thereof, and no Chase may be made within a Distance of Seven Feet from any other Chase on the same Side of the Wall

As to Chases
in Party
Walls

XIX The Roofs of Buildings shall be constructed as follows, that is to say,

As to Con-
struction of
Roofs.

1. The Flat, Gutter, and Roof of every Building, and every Turret, Dormer, Lantern Light, Skylight, or other Erection placed on the Flat or Roof thereof, shall be externally covered with Slates, Tiles, Metal, or other incombustible Materials, except the Doors, Door Frames, Windows, and Window Frames of such Dormers, Turrets, Lantern Lights, Skylights, or other Erections
2. The Plane of the Surface of the Roof of a Warehouse or other Building used either wholly or in part for Purposes of Trade or Manufacture shall not incline from the External or Party Walls upwards at a greater Angle than Forty-seven Degrees with the Horizon

XX The following Rules shall be observed as to Chimnies and Flues

Rules as to
Chimnies
and Flues

- 1 Chimnies built on Corbels of Brick, Stone, or other incombustible Materials may be introduced above the Level of the Ceiling of the Ground Story if the Work so corbelled out does not project from the Wall more than the Thickness of the Wall, but all other Chimnies shall be built on solid Foundations, and with Footings similar to the Footings of the Wall against which they are built
2. Chimnies and Flues having proper Doors of not less than Six Inches square may be constructed at any Angle, but in every other Chimney or Flue the Angles shall be constructed of an Obtuseness of not less than One Hundred and Thirty Degrees, and shall be properly rounded.
3. An Arch of Brick or Stone or a Bar of Wrought Iron must be built over the Opening of every Chimney to support the Breast thereof, and if the Breast projects more

than Four and a Half Inches from the Face of the Wall, and the Jamb on either Side is of less Width than Seventeen and a Half Inches, the Abutments must be tied in by an Iron Bar or Bars turned up and down at the Ends and built into the Jambs for at least Eight and a Half Inches on each Side

4. The Inside of every Flue, and the Back or Outside, unless forming Part of the outer Face of an External Wall, must be rendered, pargeted, or lined with Fireproof Piping.
5. The Jambs of every Chimney must at the least be Eight and a Half Inches wide on each Side of the Opening thereof
6. The Breast of every Chimney, and the Front, Withe, Partition, and Back of every Flue, must at the least be Four Inches in Thickness
7. The Back of every Chimney Opening, from the Hearth up to the Height of Twelve Inches above the Mantel, must at the least be Eight and a Half Inches thick if in a Party Wall, or Four and a Half Inches thick if not in a Party Wall
8. The Thickness of the upper Side of every Flue, when its Course makes, with the Horizon, an Angle of less than Forty-five Degrees, must be at the least Eight and a Half Inches
9. Every Chimney Shaft shall be carried up in Brick or Stone Work all round, at the least Four Inches thick, to a Height of not less than Three Feet above the Roof, Flat, or Gutter adjoining thereto, measured at the highest Point in the Line of Junction with such Roof, Flat, or Gutter
10. The Brickwork or Stonework of any Chimney Shaft, excepting that of the Furnace of any Steam Engine, Brewery, Distillery, or Manufactory, shall not be built higher above the Roof, Flat, or Gutter adjoining thereto, measured from the highest Point in the Line of Junction with such Roof, Flat, or Gutter, than a Height equal to Six Times the least Width of such Chimney Shaft at the Level of such highest Point in the Line of Junction, unless such Chimney Shaft is built with and bonded to another Chimney Shaft not in the same Lane with the first, or otherwise rendered secure.
11. There shall be laid, level with the Floor of every Story,

before the Opening of every Chimney, a Slab of Stone, Slate, or other incombustible Substance, at the least Twelve Inches longer than the Width of such Opening, and at the least Eighteen Inches wide in front of the Breast thereof :

12. On every Floor, except the lowest Floor, such Slab shall be laid wholly upon Stone or Iron Bearers, or upon Brick Trimmers, but on the lowest Floor it may be bedded on the solid Ground .
- 13 The Hearth or Slab of every Chimney shall be bedded wholly on Brick, Stone, or other incombustible Substance, and shall be solid for a Thickness of Seven Inches at the least beneath the upper Surface of such Hearth or Slab .
14. No Flue shall be built against any Party Structure, unless a Withe is properly secured thereto, at the least Four Inches in Thickness :
15. No Chimney Breast or Shaft built with or in any Party Wall shall be cut away unless the District Surveyor certifies that it can be done without injuriously affecting the Stability of any Building
16. No Chimney Shaft, Jamb, Breast, or Flue shall be cut into except for the Purpose of Repair, or doing some One or more of the following Things

Of letting in or removing or altering Flues, Pipes, or Funnels for the Conveyance of Smoke, hot Air, or Steam, or of letting in, removing, or altering Smoke Jacks .

Of forming Openings for Soot Doors, such Openings to be fitted with a close Iron Door and Frame .

Of making Openings for the Insertion of ventilating Valves, subject to the following Restriction, That no Opening shall be made nearer than Twelve Inches to any Timber or combustible Substance :

17. No Timber or Woodwork shall be placed,

In any Wall or Chimney Breast nearer than Twelve Inches to the Inside of any Flue or Chimney Opening ,

Under any Chimney Opening within Eighteen Inches from the Upper Surface of the Hearth of such Chimney Opening ,

Within Two Inches from the Face of the Brickwork or Stonework about any Chimney or Flue, where the

Substance of such Brickwork or Stonework is less than Eight and a Half Inches thick, unless the Face of such Brickwork or Stonework is rendered,

And no Wooden Plugs shall be driven nearer than Six Inches to the Inside of any Flue or Chimney Opening, nor any Iron Holdfast or other Iron Fastening nearer than Two Inches thereto.

Rules as to close
Fires, and Pipes
for conveying
Vapour, &c.

XXI. The following Rules shall be observed as to close Fires, and Pipes for conveying heated Vapour or Water ; that is to say,

1. The Floor under every Oven or Stove used for the Purpose of Trade or Manufacture, and the Floor around the same for a Space of Eighteen Inches, shall be formed of Materials of an incombustible and non-conducting Nature ,
2. No Pipe for conveying Smoke, heated Air, Steam, or hot Water shall be fixed against any Building on the Face next to any Street, Alley, Mews, or public Way :
3. No Pipe for conveying heated Air or Steam shall be fixed nearer than Six Inches to any combustible Materials
4. No Pipe for conveying hot Water shall be placed nearer than Three Inches to any combustible Materials
5. No Pipe for conveying Smoke or other Products of Combustion shall be fixed nearer than Nine Inches to any combustible Material

And if any Person fails in complying with the Rules of this Section he shall for each Offence incur a Penalty not exceeding Twenty Pounds, to be recovered before a Justice of the Peace

Rules as to Ac-
cesses and Stairs
in certain Build-
ings

XXII. The following Rules shall be observed with respect to Accesses and Stairs .

In every Public Building, and in every other Building containing more than One hundred and twenty-five thousand Cubic Feet, and used as a Dwelling House for separate Families, the Floors of the Lobbies, Corridors, Passages, and Landings, and also the Flights of Stairs, shall be of Stone or other Fire-proof Material, and carried by Supports of a Fire-proof Material.

Rules as to
habitable Rooms

XXIII The following Rules shall be observed with respect to habitable Rooms in any Building , that is to say,

1. Every habitable Room hereafter constructed in any Building, except Rooms in the Roof thereof and Cellars and underground Rooms, shall be in every Part at the least Seven Feet in Height from the Floor to the Ceiling .
2. Every habitable Room hereafter constructed in the Roof of

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every Building shall be at the least Seven Feet in Height from the Floor to the Ceiling throughout not less than One Half the Area of such Room

3. Cellars and underground Rooms shall be constructed in manner directed by the said Act for the better Local Management of the Metropolis :

And whosoever knowingly suffers any Room that is not constructed in conformity with this Section to be inhabited shall, in addition to any other Liabilities he may be subject to under this Act, incur a Penalty not exceeding Twenty Shillings for every Day during which such Room is inhabited, and any Room in which any Person passes the Night shall be deemed to be inhabited within the Meaning of this Act

XXIV Every Party Arch and every Arch or Floor over any public Way, or any Passage leading to Premises in other Occupation, shall be formed of Brick, Stone, or other incombustible Materials. If an Arch of Brick or Stone is used, it shall, in Cases where its Span does not exceed Nine Feet, be of the Thickness of Four and a Half Inches at the least, but when its Span exceeds Nine Feet, be of the Thickness of Eight and a Half Inches at the least. If an Arch or Floor of Iron or other incombustible Material is used, it shall be constructed in such a Manner as may be approved by the District Surveyor

As to Party
Arches over
public Ways

XXV Every Arch under any public Way shall be formed of Brick, Stone, or other incombustible Materials. If an Arch of Brick or Stone is used, it shall, in cases where its Span does not exceed Ten Feet, be of the Thickness of Eight and a Half Inches at the least, where its Span does not exceed Fifteen Feet, it shall be of the Thickness of Thirteen Inches at least, and where its Span exceeds Fifteen Feet, it shall be of such Thickness as may be approved by the District Surveyor : If an Arch or other Construction of Iron or other incombustible Material is used, it shall be constructed in such Manner as may be approved by the District Surveyor

As to Arches
under public
Ways

XXVI. The following Rules shall be observed as to Projections :

Rules as to
Projections.

1. Every Coving, Cornice, Facia, Window Dressing, Portico, Balcony, Verandah, Balustrade, and architectural Projection or Decoration whatsoever, and also the Eaves or Cornices to any overhanging Roof, except the Cornices and Dressings to the Window Fronts of Shops, and except the Eaves and Cornices to detached and semi-detached Dwelling Houses distant at least Fifteen Feet from any other Building, and from the Ground of any

Adjoining Owner, shall, unless the Metropolitan Board otherwise permit, be of Brick, Tile, Stone, artificial Stone, Slate, Cement, or other Fire-proof Material :

2. In Streets or Alleys of a less Width than Thirty Feet, any Shop Front may project beyond the External Wall of the Building to which it belongs for Five Inches and no more, and any Cornice of any such Shop Front may project Thirteen Inches and no more, and in any Street or Alley of a Width greater than Thirty Feet, any Shop Front may project Ten Inches and no more, and the Cornice may project for Eighteen Inches from the External Walls, but no more.
3. No Part of the Woodwork of any Shop Front shall be fixed nearer than Four and a Half Inches from the Line of Junction of any adjoining Premises, unless a Pier or Corbel of Stone, Brick, or other Fire-proof Material, Four and a Half Inches wide at the least, is built or fixed next to such adjoining Premises as high as such Woodwork is fixed, and projects an Inch at the least in front of the Face thereof
4. The Roof, Flat, or Gutter of every Building, and every Balcony, Verandah, Shop Front, or other Projection, must be so arranged and constructed, and so supplied with Gutters and Pipes, as to prevent the Water therefrom from dropping upon or running over any public Way
5. Except in so far as is permitted by this Section in the Case of Shop Fronts, and with the Exception of Water Pipes and their Appurtenances, Copings, Cornices, Facias, Window Dressings, and other like architectural Decorations, no Projection from any Building shall extend beyond the general Line of Fronts in any Street, except with the Permission of the Metropolitan Board of Works hereinafter mentioned

Rules as to the Separation of Buildings, and Limitation of their Areas.

XXVII The following Rules shall be observed as to the Separation of Buildings, and Limitation of their Areas

1. Every Building shall be separated by External or Party Walls from any adjoining Building
2. Separate Sets of Chambers or Rooms tenanted by different Persons shall, if contained in a Building exceeding Three thousand six hundred Square Feet in Area, be deemed to be separate Buildings, and be divided accordingly, so far as they adjoin vertically by Party Walls, and so far as they adjoin horizontally by Party Arches or Fire-proof Floors

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3. If any Building in One Occupation is divided into Two or more Tenements, each having a separate Entrance and Staircase, or a separate Entrance from without, every such Tenement shall be deemed to be a separate Building for the purposes of this Act
- 4 Every Warehouse, or other Building used either wholly or in part for the Purposes of Trade or Manufacture, containing more than Two hundred and sixteen thousand Cubic Feet, shall be divided by Party Walls in such Manner that the Contents of each Division thereof shall not exceed the above-mentioned Number of Cubic Feet *

XXVIII The following Rules shall be observed as to uniting Buildings Rules as to uniting Buildings

1. No Buildings shall be united unless they are wholly in the same Occupation
2. No Buildings shall be united, if when so united they will, considered as One Building only, be in contravention of any of the Provisions of this Act .
3. No Opening shall be made in any Party Wall dividing Buildings, which, if taken together, would contain more than Two hundred and sixteen thousand Cubic Feet, except under the following Conditions

Such Opening shall not exceed in Width Seven Feet or in Height Eight Feet

Such Opening shall have the Floor, Jambs, and Head formed of Brick, Stone, or Iron, and be closed by Two Wrought Iron Doors, each One Fourth of an Inch thick in the Panel, at a Distance from each other of the full Thickness of the Wall, fitted to rebated Frames, without Woodwork of any kind ;

- 4 Whenever any Buildings which have been united cease to

* But by the Metropolitan Building Act Amendment Act (1860), section 2, this was altered thus —The Rules of "Metropolitan Building Act, 1855," limiting the Cubical Dimensions or Contents of Buildings used either wholly or in part for the Purposes of Trade or Manufacture, shall not after the passing of this Act apply to any Building to be used wholly for the Manufacture of the Machinery and Boilers of Steam Vessels beyond the Distance of Three Miles from *Saint Paul's Cathedral*. Provided always that every such Building shall consist of One Floor only, and shall be constructed of Brick, Stone, Iron, or other incombustible Material, and it shall not be lawful for the Owners, Lessees, or Occupiers thereof, or for any Persons interested therein, to use such Building for any other Purpose than the Manufacture of the Machinery and the Boilers of Steam Vessels until all the Rules and Provisions of the said Act, as to Party Walls and other Matters which are applicable to Buildings of a similar Character, shall have been duly complied with. Provided also, that every such Building, if of greater Dimensions than Two hundred and sixteen thousand Cubic Feet, shall be subject to the Approval of the Metropolitan Board of Works, in the same Manner as Iron Buildings or Buildings to which the Rules of the said Act are inapplicable as set forth in the Fifty-sixth Section of such Act.

Rules as to Cubical Dimensions of the Metropolitan Building Act 1855, not to Building be used for Manufacture Machinery Boilers of Steam Vessels, provided that such Buildings shall consist of One Floor only, &c

be in the same Occupation, any Openings made in the Party Walls dividing the same shall be stopped up with Brick or Stone Work of the full Thickness of the Wall itself, and properly bonded therewith.

As to open
Spaces near
Dwelling Houses

XXIX Every Building used or intended to be used as a Dwelling House, unless all the Rooms can be lighted and ventilated from a Street or Alley adjoining, shall have in the Rear or on the Side thereof an open Space exclusively belonging thereto of the Extent at least of One hundred Square Feet

Construction of
Public Buildings

XXX Notwithstanding anything herein contained, every Public Building, including the Walls, Roofs, Floors, Galleries, and Staircases, shall be constructed in such Manner as may be approved by the District Surveyor, or, in the event of Disagreement, may be determined by the Metropolitan Board, and, save in so far as respects the Rules of Construction, every Public Building shall throughout this Act be deemed to be included in the Term Building, and be subject to all the Provisions of this Act, in the same Manner as if it were a Building erected for a Purpose other than a Public Purpose

DISTRICT SURVEYORS

Buildings to be
supervised by
District Sur-
veyors

XXXI With the Exemptions hereinbefore mentioned, every Building, and every Work done to, in, or upon any Building, shall be subject to the Supervision of the District Surveyor appointed to the District in which the Building is situate.

Power to Metro-
politan Board of
Works esta-
blished under 18
& 19 Vict, c. 120

XXXII The following Things may be done by the Metropolitan Board of Works, established by the said Act for the better Local Management of the Metropolis, by Order, at their Discretion, that is to say,

1. That they may alter the Limits of any District, or unite any Two or more Districts together, and in any such Case place such altered District under the Supervision of any existing or of any future District Surveyor, with Power from Time to Time to alter any District so made, and do all such Matters and Things as are necessary for carrying into effect the Power hereby given :
2. They may dismiss any existing District Surveyor, with the Consent of One of Her Majesty's Principal Secretaries of State, they may suspend any such Surveyor as last aforesaid, they may dismiss or suspend any future District Surveyor, and in case of any Suspension or during any Vacancy they may appoint a temporary substitute
3. Whenever any Vacancy occurs in the Office of any existing

or future District Surveyor they may appoint another qualified Person in his Place

4. They may pay such Amount of Compensation as they think fit to any District Surveyor who may be deprived of his Office, in pursuance of the Power hereby given of altering the Limits of Districts

But, subject to the Provisions herein contained, the several Places which at the Time when this Act comes into operation are constituted Districts under an Act passed in the Eighth Year of the Reign of Her Present Majesty, Chapter Eighty-Four, and intituled *An Act for regulating the Construction and Use of Buildings in the Metropolis and its Neighbourhood*, for the purposes of that Act, shall continue to be Districts for the Purposes of this Act, and the several Persons who at the Time when this Act comes into operation are District Surveyors under the Provisions of the said Act shall continue to be District Surveyors under this Act

XXXIII The Institute of *British Architects* may from Time to Time cause to be examined, by such Persons and in such Manner as they think fit, all Candidates presenting themselves for the Purpose of being examined as to their Competency to perform the Duties of District Surveyor, and shall grant Certificates of Competency to the Candidates found deserving of the same, and no Person who has not already filled the Office of District Surveyor, or has not already obtained a Certificate of Competency in pursuance of the said Act of the Eighth Year of the Reign of Her present Majesty, Chapter Eighty-Four, shall be qualified to be appointed to that Office, unless he has received a Certificate of Competency from the said Institute of *British Architects*, or has been examined in such other Manner as the said Metropolitan Board may direct, and been found competent in such Examination.

Examination
Institute of
British Archi-
tects.

XXXIV. Every District Surveyor shall have and maintain an Office at his own Expense in such Part of his District as may be approved by the Metropolitan Board of Works

District Sur-
veyor to hav
and maintain
Office

XXXV. If any District Surveyor is prevented by Illness, Infirmary, or any other unavoidable Circumstance from attending to the Duties of his Office, he may, with the consent of the Metropolitan Board of Works, appoint some other Person as his Deputy to perform all his Duties for such Time as he may be prevented from executing them.

District Sur-
veyor may ap-
point Deputy
with Consen

XXXVI. If at any Time it appears to the Metropolitan Board of Works that, on account of the Pressure of Business in any District, or any other Account, the Surveyor of that District

Assistant St
veyor may b
appointed on
Emergency

cannot discharge his Duties promptly and efficiently, then such Board may direct any other District Surveyor to assist the Surveyor of such District in the Performance of his Duties, or appoint some other Person to give such Assistance, and such Assistant Surveyor shall be entitled to receive all Fees payable in respect of the Services performed by him

District Surveyor not to act in case of Works under his professional Superintendence.

XXXVII. If any Building is executed, or any Work done to, in, or upon any Building, by or under the Superintendence of any District Surveyor acting professionally or on his own private Account, it shall not be lawful for such Surveyor to survey any such Building for the Purpose of this Act, or to act as District Surveyor in respect thereof or in any Matter connected therewith, but it shall be his Duty to give Notice thereof to the said Metropolitan Board, who shall then appoint some other District Surveyor to act in respect of such Matter.

NOTICES TO DISTRICT SURVEYORS.

Notices to be given to District Surveyor by Builder.

XXXVIII. Two Days before the following Acts or Event, that is to say,

Two Days before any Building, or any Work to, in, or upon any Building, is commenced, and also, if the Progress of any such Building or Work is after the Commencement thereof suspended for any Period exceeding Three Months, Two Days before such Building or Work is resumed, and also if during the Progress of any such Building or Work the Builder employed thereon is changed, then Two Days before any new Builder enters upon the Continuance of such Building or Work,

It shall be the Duty of the Builder engaged in building or rebuilding such Building, or in executing such Work, or in continuing such Building or Work, to give to the District Surveyor Notice in Writing stating the Situation, Area, and Height, and intended Use of the Building or Buildings about to be commenced, or to, in, or upon which any Work is to be done, and the number of such Buildings if more than One, and also the Particulars of any such proposed Work, and stating also his own Name and Address, but any Works to, in, or upon the same Building that are in progress at the same Time may be included in One Notice.

District Surveyor to cause Rules of this Act to be observed.

XXXIX. Every District Surveyor shall, upon the Receipt of any such Notice as aforesaid, and also upon any Work affected by the Rules of this Act, but in respect of which no Notice has been given, being observed by or made known to him, and also from Time to Time during the Progress of any Works affected by the Rules and Directions of this Act, as often as may be necessary for

securing the due Observance of such Rules, survey any Building or Work hereby placed under their Supervision, and cause all the Rules of this Act to be duly observed

XL Every Notice given in pursuance of this Act shall be deemed, in any Question relative to any Building or Work, to be *prima facie* Evidence as against such Builder of the Nature of the Building or Work proposed to be built or done

Notice to be Evidence of intended Works.

XLI. If any Builder neglects to give Notice in any of the Cases aforesaid, or executes any Works of which he is hereby required to give Notice before giving the same, or having given due Notice of any Works executes the same before the Expiration of Two Days from the Time of giving such Notice, such Builder shall for every such Offence incur a Penalty not exceeding Twenty Pounds, to be recovered before a Justice of the Peace.

Penalty on Builders neglecting to give Notice

XLII At all reasonable Times during the Progress of any Building or Work affected by this Act it shall be lawful for the District Surveyor to enter and inspect such Building or Work, and if any Person refuses to admit such Surveyor to inspect such Building or Work, or refuses or neglects to afford such Surveyor all reasonable Assistance in such Inspection, in every such Case the Offender shall incur for each Offence a penalty not exceeding Twenty Pounds, to be recovered before a Justice of the Peace

District Surveyor may enter and inspect Buildings affected by this Act

Penalty for Refusal.

XLIII The District Surveyor may at all reasonable Times enter any Premises, with the Exception of Buildings herein-before exempted by Name, for the Purpose of ascertaining whether any Buildings erected in such Premises are in such a Situation or possess such Characteristics as are herein-before required in order to exempt them from the Operation of this Act, and he may do all such Things as are necessary for the above purpose, and if any Person refuses to admit such Surveyor to enter such Premises or to inspect any such Building, or neglects to afford to him all reasonable Assistance in such Inspection, in every such Case the Offender shall incur for each Offence a Penalty not exceeding Twenty Pounds, to be recovered before a Justice of the Peace.

District Surveyor may enter Buildings to ascertain as to exempted Buildings.

XLIV If by reason of any Emergency any Act or Work is required to be done immediately, or before Notice can be given as aforesaid, then it shall be lawful to do the Act or Work so required to be done, upon Condition that before the Expiration of Twenty-four Hours after such Act or Work has been begun Notice thereof is given to the District Surveyor.

In case of Emergency, Work may be commenced without Notice.

PROCEEDINGS BY DISTRICT SURVEYORS IN CASE OF IRREGULARITY.

XLV In the following Cases, that is to say,—

If in erecting any Building, or in doing any Work to, in, or

Notice by District Surveyor in case of Irregularity.

upon any Building, anything is done contrary to any of the Rules of this Act, or anything required by this Act is omitted to be done, or

In Cases where due Notice has not been given,—

If the District Surveyor, on surveying or inspecting any Building or Work, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the Rules of this Act, or whether anything required by the Rules of this Act has been omitted to be done,

In every such Case the District Surveyor shall give to the Builder engaged in erecting such Building, or in doing such Work, Notice in Writing requiring such Builder, within Forty-eight Hours from the Date of such Notice, to cause anything done contrary to the Rules of this Act to be amended, or to do anything required to be done by this Act, but which has been omitted to be done, or to cause so much of any Building or Work as prevents such District Surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be to a sufficient Extent cut into, laid open, or pulled down.

On Noncompliance with Notice of Justice to summon Builder, and make Order to comply with Requisition

XLVI If the Builder to whom such Notice is given makes default in complying with the Requisition thereof within such Period of Forty-eight Hours, the District Surveyor may cause Complaint of such Noncompliance to be made before a Justice of the Peace, and such Justice shall thereupon issue a Summons requiring the Builder so in default to appear before him, and if upon his Appearance, or in his Absence, upon due proof of the Service of such Summons, it appears to such Justice that the Requisitions made by such Notice or any of them are authorized by this Act, he shall make an Order on such Builder commanding him to comply with the Requisitions of such Notice, or any of such Requisitions that may in his Opinion be authorized by this Act, within a Time to be named in such Order.

Penalty on Non-compliance with Order of Justice.

XLVII If such Order is not complied with, the Builder on whom it is made shall incur a Penalty not exceeding Twenty Pounds a Day, to be recovered before a Justice of the Peace, during every Day of the Continuance of such Noncompliance, and in addition thereto the District Surveyor may, if he thinks fit, proceed with a sufficient Number of Workmen to enter upon the Premises, and do all such Things as may be necessary for enforcing the Requisitions of such Notice, and for bringing any Building or Work into conformity with the Rules of this Act, and all Expenses incurred by him in so doing and in any such Proceedings as aforesaid, may be recovered from the Builder on

whom such Order was made, in a summary Manner, before a Justice of the Peace, or may be recovered from the Owner of the Premises in the same Manner in which Expenses incurred by the Commissioners herein-after named in respect of dangerous Buildings are herein-after directed to be recovered from any Owner, and if the Owner cannot be found, or if, on Demand, he refuses or neglects to pay the aforesaid Expenses, the District Surveyor shall have the same Power of taking and selling the Building in respect of which the Order is made, and of applying the Proceeds, as is thereby given to the Commissioners

XLVIII If any Workman, Labourer, Servant, or other Person employed in or about any Building, wilfully, and without the Privity or Consent of the Person causing such Work to be done, does anything in or about such Building contrary to the Rules of this Act, he shall for each such Offence incur a Penalty not exceeding Fifty Shillings.

Penalty on Workmen, &c., doing anything contrary to Rules of Act.

FEEs OF DISTRICT SURVEYORS.

XLIX There shall be paid to the District Surveyors, in respect of the several Matters specified in the First Part of the Second Schedule hereto, the Fees therein specified, or such other Fees, not exceeding the Amounts therein specified, as may from Time to Time be directed by the Metropolitan Board of Works, but One Fee only shall be chargeable with respect to any such Works done in, to, or upon any Building as are in pursuance of the Provisions herein before contained included in One Notice, and if in consequence of any Reduction being made by the said Metropolitan Board in the Amount of the said scheduled Fees the Income of any existing District Surveyor is diminished, the Metropolitan Board shall grant to him Compensation in respect of such Diminution

Payments to District Surveyors in respect of Matters in First Part of Second Schedule

L If any special Service is required to be performed by the District Surveyor under the First Part of this Act, for which no Fee is specified in the said Schedule, the Metropolitan Board of Works may order such Fee to be paid for such Service as they think fit, and the District Surveyor shall have the same Remedy for recovering such special Fee as if the same were expressly named in the said Schedule

Metropolitan Board may appoint special Fee for Services not provided for

LI At the Expiration of the following Periods, that is to say,
of One Month after the Roof of any Building surveyed by any District Surveyor under this Act has been covered in,
of Fourteen Days after the Completion of any such Work as is by this Act placed under the Supervision of the District Surveyor,

Periods when Surveyors entitled to Fees.

of Fourteen Days after any special Service in respect of any Building has been performed, the District Surveyor shall be entitled to receive the Amount of Fees due to him from the Builder employed in erecting such Building, or in doing such Work, or in doing any Matter in respect of which any special Service has been performed by the Surveyor, or from the Owner or Occupier of the Building so erected or in respect of which such Work has been done or Service performed, and if any such Builder, Owner, or Occupier refuses to pay the same, such Fees may be recovered in a summary Manner before a Justice of the Peace, upon its being shown to the Satisfaction of such Justice that a proper Bill specifying the Amount of such Fees was delivered to such Builder, Owner, or Occupier, or sent to him in a registered Letter addressed to his last known Residence.

RETURNS BY DISTRICT SURVEYORS

District Surveyor to make monthly Returns to Metropolitan Board of Works

LII Every District Surveyor shall, within Seven Days after the First Day of every Month, make a Return to the Metropolitan Board of Works, in such Manner as they may appoint, of all Notices and Complaints received by him relative to the Business of his District, and the Results thereof, and of all Matters brought by him before any Justice of the Peace, and of all the several Works supervised and special Services performed by him in the Exercise of his Office within the previous Month, and of all Fees charged or received in respect thereof, and specify in such Return the Description and Locality of every Building built, rebuilt, enlarged, or altered, or on which any Work has been done under his Supervision, with the particular Nature of every Work in respect of which any Fee has been charged or received

Return duly signed to be a Certificate that Works are agreeable to Act

LIII. Every such Return shall be signed by such Surveyor, and shall be deemed to be a Certificate that all the Works enumerated therein as completed have been done in all respects agreeably to this Act, according to the best of his Knowledge and Belief, and that they have been duly surveyed by him.

Superintending Architect to audit Accounts of Fees charged by District Surveyors, and to report in case of Excess.

LIV The Officer herein-after mentioned as the Superintending Architect of Metropolitan Buildings, or such other Officer as the Metropolitan Board of Works appoint, shall from Time to Time examine the said monthly Returns made by the District Surveyors, and in case any Fees therein specified appear to such Officer to be unauthorized by this Act, or to exceed in amount the Rates hereby made payable, or in case any such Account appears to be in any respect fraudulent or untrue, he shall make his Report in Writing to that Effect to the Metropolitan Board of Works, who shall thereupon take such Steps in the Matter as they deem expedient.

POWERS OF METROPOLITAN BOARD OF WORKS

L.V. The Metropolitan Board of Works may, by Order, made with the Consent of Her Majesty in Council, alter, in such Manner as they may think fit, the Rules for the Regulation of the Thickness of Walls contained in the First Schedule hereto

Power for Metropolitan Board of Works to modify Rules.

LVI. Whenever any Builder is desirous of erecting any Iron Building, or any other Building to which the Rules of this Act are inapplicable, he shall make an Application to the Metropolitan Board of Works, stating such Desire, and setting out a Plan of the proposed Building, with such Particulars as to the Construction thereof as may be required by the said Board, and the latter, if satisfied with such Plan and Particulars, shall signify their approval of the same, and thereupon such Building may be constructed according to such Plan and Particulars, but it shall not be lawful for such Board to authorize any Warehouse or other Building used either wholly or in part for the Purposes of Trade or Manufacture to be erected of greater Dimensions than Two hundred and sixteen thousand Cubic Feet, unless it is divided by Party Walls in manner herein-before required.

Buildings to which Rules of Act are inapplicable

LVII. The said Metropolitan Board may, for the Purpose of regulating the Proceedings of such Applicants as aforesaid, from Time to Time issue such General Rules as to the Time and Manner of making such Applications, as to the Plans to be presented, as to the Expenses to be incurred, and as to any other Matter or Thing connected therewith, as they may think fit

Power of Metropolitan Board to make general Rules

LVIII The Approval by the Metropolitan Board of Works of any Plans or Particulars, in pursuance of the foregoing Provisions, shall be signified by Writing under the Hand of the Superintending Architect of Metropolitan Buildings, and countersigned by the Chairman of such Board, or by any other Officer appointed by the Board

Approval of Board how signified.

LIX The said Metropolitan Board may from Time to Time prepare or sanction Forms of the various Notices required by this Act, and may from Time to Time make such Alterations therein as they deem requisite, and they shall cause every such Form to be sealed with the Seal of the Board, or marked with some other distinguishing Mark, and any Notice made in a Form sanctioned by the Board shall in all Proceedings be held sufficient in Law

Board to issue Forms of Notices

LX All Expenses incurred in and about the obtaining such Approval of the Metropolitan Board of Works as aforesaid shall be paid by the Builder to the said Superintending Architect, or to

Expenses of Orders to be borne by Builders.

of Fourteen Days after any special Service in respect of any Building has been performed, the District Surveyor shall be entitled to receive the Amount of Fees due to him from the Builder employed in erecting such Building, or in doing such Work, or in doing any Matter in respect of which any special Service has been performed by the Surveyor, or from the Owner or Occupier of the Building so erected or in respect of which such Work has been done or Service performed, and if any such Builder, Owner, or Occupier refuses to pay the same, such Fees may be recovered in a summary Manner before a Justice of the Peace, upon its being shown to the Satisfaction of such Justice that a proper Bill specifying the Amount of such Fees was delivered to such Builder, Owner, or Occupier, or sent to him in a registered Letter addressed to his last known Residence.

RETURNS BY DISTRICT SURVEYORS

District Surveyor to make monthly Returns to Metropolitan Board of Works

LII. Every District Surveyor shall, within Seven Days after the First Day of every Month, make a Return to the Metropolitan Board of Works, in such Manner as they may appoint, of all Notices and Complaints received by him relative to the Business of his District, and the Results thereof, and of all Matters brought by him before any Justice of the Peace, and of all the several Works supervised and special Services performed by him in the Exercise of his Office within the previous Month, and of all Fees charged or received in respect thereof, and specify in such Return the Description and Locality of every Building built, rebuilt, enlarged, or altered, or on which any Work has been done under his Supervision, with the particular Nature of every Work in respect of which any Fee has been charged or received

Return duly signed to be a Certificate that Works are agreeable to Act

LIIL. Every such Return shall be signed by such Surveyor, and shall be deemed to be a Certificate that all the Works enumerated therein as completed have been done in all respects agreeably to this Act, according to the best of his Knowledge and Belief, and that they have been duly surveyed by him.

Superintending Architect to audit Accounts of Fees charged by District Surveyors, and to report in case of Excess.

LIV The Officer herein-after mentioned as the Superintending Architect of Metropolitan Buildings, or such other Officer as the Metropolitan Board of Works appoint, shall from Time to Time examine the said monthly Returns made by the District Surveyors, and in case any Fees therein specified appear to such Officer to be unauthorized by this Act, or to exceed in amount the Rates hereby made payable, or in case any such Account appears to be in any respect fraudulent or untrue, he shall make his Report in Writing to that Effect to the Metropolitan Board of Works, who shall thereupon take such Steps in the Matter as they deem expedient.

POWERS OF METROPOLITAN BOARD OF WORKS

L.V. The Metropolitan Board of Works may, by Order, made with the Consent of Her Majesty in Council, alter, in such Manner as they may think fit, the Rules for the Regulation of the Thickness of Walls contained in the First Schedule hereto

Power for Metropolitan Board of Works to modify Rules.

LVI Whenever any Builder is desirous of erecting any Iron Building, or any other Building to which the Rules of this Act are inapplicable, he shall make an Application to the Metropolitan Board of Works, stating such Desire, and setting out a Plan of the proposed Building, with such Particulars as to the Construction thereof as may be required by the said Board, and the latter, if satisfied with such Plan and Particulars, shall signify their approval of the same, and thereupon such Building may be constructed according to such Plan and Particulars, but it shall not be lawful for such Board to authorize any Warehouse or other Building used either wholly or in part for the Purposes of Trade or Manufacture to be erected of greater Dimensions than Two hundred and sixteen thousand Cubic Feet, unless it is divided by Party Walls in manner herein-before required.

Buildings to which Rules of Act are inapplicable.

LVII. The said Metropolitan Board may, for the Purpose of regulating the Proceedings of such Applicants as aforesaid, from Time to Time issue such General Rules as to the Time and Manner of making such Applications, as to the Plans to be presented, as to the Expenses to be incurred, and as to any other Matter or Thing connected therewith, as they may think fit

Power of Metropolitan Board to make general Rules

LVIII The Approval by the Metropolitan Board of Works of any Plans or Particulars, in pursuance of the foregoing Provisions, shall be signified by Writing under the Hand of the Superintending Architect of Metropolitan Buildings, and countersigned by the Chairman of such Board, or by any other Officer appointed by the Board.

Approval of Board how signified.

LIX The said Metropolitan Board may from Time to Time prepare or sanction Forms of the various Notices required by this Act, and may from Time to Time make such Alterations therein as they deem requisite, and they shall cause every such Form to be sealed with the Seal of the Board, or marked with some other distinguishing Mark, and any Notice made in a Form sanctioned by the Board shall in all Proceedings be held sufficient in Law

Board to issue Forms of Notices

LX. All Expenses incurred in and about the obtaining such Approval of the Metropolitan Board of Works as aforesaid shall be paid by the Builder to the said Superintending Architect, or to

Expenses of Orders to be borne by Builders.

such other Person as the said Board may appoint, and in default of Payment may be recovered in a summary Manner.

District Surveyor to see Plans carried into Execution.

LXI A Copy of any Plans and Particulars, approved by the Metropolitan Board of Works, shall be furnished to the Surveyor within whose District the Building to which such Plans and Particulars relate is situate, and thereupon it shall be the Duty of such District Surveyor to ascertain that the same is built in accordance with the said Plans and Particulars

Power to Metropolitan Board to appoint Superintending Architect and Clerks

LXII The Metropolitan Board of Works may, for the Purpose of aiding in the Execution of this Act, appoint some fit Person, to be called the "Superintending Architect of Metropolitan Buildings," together with such Number of Clerks as they think fit, such Architect and Clerks shall be removable by the said Metropolitan Board, and shall perform such Duties as the said Board direct, but it shall not be lawful for any Superintending Architect to practise as an Architect, or to follow any other Occupation

Superintending Architect may appoint Deputy, with Consent

LXIII If the Superintending Architect is prevented by Illness, Infirmary, or any other unavoidable Circumstance from attending to the Duties of his Office, he may, with the Consent of the Metropolitan Board of Works, appoint some other Person as his Deputy to perform all his Duties for such Time as he may be temporarily prevented from executing them.

Salaries to Architect and Clerks

LXIV There shall be paid to such Superintending Architect and Clerks such Salaries as the said Metropolitan Board may from Time to Time direct

EXPENSES

Power of Metropolitan Board to pay Salaries

LXV The said Metropolitan Board may at any Time hereafter by Order, cause such fixed Salary as they may determine to be paid to any District Surveyor by way of Remuneration instead of Fees, provided the Amount of such Remuneration be not less than the Amount of the Average of the Fees for the last Three Years, and thereupon such Surveyor shall pay all Fees received by him under this Act into the Hands of the said Superintending Architect

Monies received by Superintending Architect to be paid to the Metropolitan Board

LXVI. All Monies received by the Superintending Architect in pursuance of this Act shall be accounted for and paid by him into the Hands of the Treasurer of the said Metropolitan Board, at such Time and in such Manner as the said Board may direct

Metropolitan Board may pay Salaries out of Rates.

LXVII The said Metropolitan Board may at any Time hereafter provide, either wholly or partially, for the Payment of Salaries to the District Surveyors, or to any of them, out of the Rates leviable by such Board, in pursuance of the said Act for the better local Management of the Metropolis, and may thereupon abolish or reduce any Fees hereby made payable to the District Surveyors.

LXVIII. All Expenses of carrying into Execution this Act, not hereby otherwise provided for, shall be deemed to be Expenses incurred by the said Metropolitan Board in the Execution of the said Act for the better local Management of the Metropolis, and shall be raised and paid accordingly.

Expenses, how borne

PART II.

DANGEROUS STRUCTURES

PART II

Dangerous Structures

LXIX. Whenever it is made known to the Commissioners [or the Metropolitan Board] * that any Structure (including in such Expression any Building, Wall, or other Structure, and anything affixed to or projecting from any Building, Wall, or other Structure,) is in a dangerous State, such Commissioners [or the said Metropolitan Board] shall require a Survey of such Structure to be made by the District Surveyor, or by some other competent Surveyor, and it shall also be the Duty of the District Surveyor to make known to the said Commissioners [or Metropolitan Board] any Information he may receive with respect to any Structure being in such State as aforesaid

Survey to be made of dangerous Structures
8 Vict., c. 41, s. 46

LXX. In Cases where any such Structure is situate within the City of *London* or the Liberties thereof, herein-after included under the Expression "the City of *London*," the Expression "the Commissioners" shall mean "the Commissioners of Sewers of the City of *London*," † [but when such Structure is situate elsewhere it shall mean "the Commissioners of Police of the Metropolis," or such One of them as may be authorized by One of Her

Definition of "Commissioners"

* By the Metropolitan Buildings Act Amendment Act, 32 and 33 Vict., c. 82, the Metropolitan Board of Works were substituted for the Commissioners originally named throughout Part II. of this Act

† Repealed by the Metropolitan Building Act Amendment Act, 32 and 33 Vict., c. 82, which enacts —Section 4 The Powers given by Part Two of the Metropolitan Building Act, 1855, to the Commissioners of Police of the Metropolis with respect to the survey of and securing and Notice respecting Structures in a dangerous State, and to taking down, securing, or repairing such Structures, and to the recovery of the Expenses thereof, and to the appointment of Persons and making of Regulations for carrying into Execution Part Two of the said Act relating to such Structures, shall, on the commencement of this Act, be transferred to and vest in, and may thereafter be exercised by, the Metropolitan Board of Works, and the Expression "the Commissioners" throughout the said Part (so far as regards Structures situate within the Limits of the said Act, and not within the City of *London*) shall mean the Metropolitan Board of Works (a)

Transfer of Powers over dangerous Structures to the Metropolitan Board of Works

(a) The effect of this section is therefore to substitute in this part of the Act the Metropolitan Board of Works for the Commissioners of Police in all cases where the structure is situated outside the City of *London*, but to leave to the Commissioners of Sewers in the City of *London* the jurisdiction over all structures within it

Majesty's Principal Secretaries of State to act in the Matter of this Act.]

Surveyor on
Completion of
Survey to give
Certificate

LXXI Upon the Completion of his Survey the Surveyor employed shall certify to the said Commissioners [or Metropolitan Board] his opinion as to the State of any such Structure as aforesaid.

Proceedings to
be taken in re-
spect of Certifi-
cate

LXXII If such Certificate is to the Effect that such Structure is not in a dangerous State, no further Proceedings shall be had in respect thereof, but if it is to the Effect that the same is in a dangerous State, the Commissioners [or the said Board] shall cause the same to be shored up, or otherwise secured, and a proper Hoard or Fence to be put up for the Protection of Passengers, and shall cause Notice in Writing to be given to the Owner or Occupier of such Structure requiring him forthwith to take down, secure, or repair the same, as the case requires

On Non compli-
ance with Notice
Justice to sum-
mon Owner &c.,
and make Order
to comply with
Requisition.

LXXIII If the Owner or Occupier to whom Notice is given as last aforesaid fails to comply, as speedily as the Nature of the Case permits, with the Requisition of such Notice, the said Commissioners [or Board] may make Complaint thereof before a Justice of the Peace, and it shall be lawful for such Justice to order the Owner, or on his Default the Occupier, of any such Structure to take down, repair, or otherwise secure, to the satisfaction of the Surveyor who made such Survey as aforesaid, or of such other Surveyor as the said Commissioners may appoint, such Structure or such Part thereof as appears to him to be in a dangerous State, within a Time to be fixed by such Justice, and in case the same is not taken down, repaired, or otherwise secured within the Time so limited, the said Commissioners [or Board] may with all convenient Speed cause all or so much of such Structure as is in a dangerous Condition to be taken down, repaired, or otherwise secured, in such Manner as may be requisite, and all Expenses incurred by the said Commissioners [or Board] in respect of any dangerous Structure by virtue of the Second Part of this Act shall be paid by the Owner of such Structure, but without Prejudice to his Right to recover the same from any Lessee or other Person liable to the Expenses of Repairs.

If Owner cannot
be found, Com-
missioners may
sell Structure,
giving the sur-
plus to Owner,
&c.

LXXIV If such Owner cannot be found, or if, on Demand, he refuses or neglects to pay the aforesaid Expenses, the said Commissioners [or Board], after giving Three Months' Notice of their Intention to do so, by posting a printed or written Notice in a conspicuous Place on the Structure in respect of which or of Part of which they have incurred Expense, or on the Land whereon it stands, may sell such Structure, and they shall, after deducting

from the Proceeds of such Sale the Amount of all Expenses incurred by them, restore the Surplus (if any) to the Owner.

LXXV All Payments hereby directed to be made by or to the Commissioners [or Board] shall in the Cases of Payments in respect of any Structure situate within the City of London be made by or to the Chamberlain of the City out of or to the Consolidated Rate made by the Commissioners of Sewers, * [and in the Cases of Payments in respect of any Structure situate elsewhere within the Limits of this Act be made by or to the Receiver of Metropolitan Police], * in the same Manner in which Payments are made by or to such Chamberlain and Receiver respectively in the ordinary Course of their Business, but no Commissioner or other Officer shall be liable in respect of any Loss that may be sustained by any Person in consequence of the Exercise by the said Commissioners of the Powers hereby given them, unless such Loss happens through the wilful Default of such Commissioner or other Officer

Payments by or to the Commissioners, how made.

LXXVI. In Cases where any Surplus is hereby made payable to any Owner, if no Demand for the same is made by any Person entitled thereto within One Year, then the same shall be paid into the Bank of England in the Name and with the Privity of the Accountant-General of the Court of Chancery, to be placed to his Account there to the Credit of the Owner (describing him so far as the Commissioners [or the said Metropolitan Board] can), subject to the Control of the Court, and to be paid out to the Owner on his applying by Petition, and proving his Title thereto.

Surplus how to be applied if no Demand made for it.

LXXVII There shall be paid to the District Surveyor, or to such other Surveyor as aforesaid, in respect of his Services under the Second Part of this Act, such Fees, not exceeding the Amounts specified in the Second Part of the Second Schedule hereto, as may from Time to Time be directed by the said Metropolitan Board.

Fees to District Surveyor

LXXVIII If any special Service is required to be performed by the District Surveyor, or by such other Surveyor as aforesaid, under the Second Part of this Act, for which no Fee is specified in

Metropolitan Board may appoint special Fees for Services not provided for

— Repealed by 32 and 33 Vict., c. 82, which also enacts —Section 5. All Payments directed by Part Two of the Metropolitan Building Act, 1855, as amended by this Act, to be made by the Metropolitan Board of Works in respect of any Structure situate within the Limits of that Act, and not within the City of London, and all Expenses incurred by the said Board in carrying into Execution Part Two of the said Act shall be deemed to be Part of their Expenses in carrying into Execution the said Act, and shall be raised and paid accordingly

Expenses of Metropolitan Board of Works

All Payments directed by Part Two of the said Act, as amended by this Act to be made to the Metropolitan Board of Works, shall be made in the same Manner in which Payments are made to the Board in the ordinary Course of their Business

the said Schedule, the said Metropolitan Board may order such Fee to be paid for such Service as they think fit.

Fees to be
deemed part of
Expenses

LXXIX. All Fees paid to the District Surveyor, or to such other Surveyor as aforesaid, by virtue of the Second Part of this Act, shall be deemed to be Expenses incurred by the said Commissioners [or Board] in the Matter of the dangerous Structure in respect of which such Fees are paid, and shall be recoverable by them from the Owner accordingly

Justice of Peace
may cause In-
mates to be re-
moved from
dangerous Struc-
tures.

LXXX. In Cases where a Structure has been certified by a District Surveyor, or such other Surveyor as aforesaid, to be dangerous to its Inmates, a Justice of the Peace may, if satisfied of the Correctness of such Certificate, upon the Application of the said Commissioners [or Board], by Order under his Hand, direct any Inmates of such Structure to be removed therefrom by a Constable or other Peace Officer, and if they have no other Abode he may require them to be received into the Workhouse established for the Reception of the Poor of the Place in which such Structure is situate

Powers of Com-
missioners to
appoint Officers

LXXXI. *[Subject to the Approval of One of Her Majesty's Principal Secretaries of State,]* the said Commissioners [or Board] may appoint such Persons at such Salaries, and make such Regulations, as they think fit for carrying into execution the Second Part of this Act, †[and all Expenses incurred by them not hereby otherwise provided for shall, in the Case of Expenses incurred by the said Commissioners of Police, be deemed to be Expenses incurred by them in respect of the Police Force of which they are Commissioners, and be payable accordingly,]† and all Expenses incurred by the said Commissioners of Sewers shall be paid out of the said Consolidated Rate.

PART III.

PART III.

PARTY STRUCTURES.

Party Structures

PRELIMINARY.

Definition of
Building Owner
and Adjoining
Owner

LXXXII. In the Construction of the following Provisions relating to Party Structures, such one of the Owners of the

* ———* Repealed by 32 and 33 Vict., c. 82. See *ante* note on section 70.

† ———† Repealed by 32 and 33 Vict. c. 82. See *ante*, note on section 75.

Premises separated by or adjoining to any Party Structure as is desirous of executing any work in respect to such Party Structure shall be called the Building Owner, and the Owner of the other Premises shall be called the Adjoining Owner.

RIGHTS OF BUILDING AND ADJOINING OWNERS.

LXXXIII The Building Owner shall have the following Rights in relation to Party Structures, that is to say, Rights of Building Owner

- (1) A Right to make good or repair any Party Structure that is defective or out of repair.
- 2.) A Right to pull down and rebuild any Party Structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same
- (3.) A Right to pull down any Timber or other Partition that divides any Buildings, and is not conformable with the Regulations of this Act, and to build instead a Party Wall conformable thereto :
- (4.) In the Case of Buildings having Rooms or Stories the Property of different Owners intermixed, a Right to Pull down such of the said Rooms or Stories or any Part thereof as are not built in conformity with this Act, and to rebuild the same in conformity with this Act
- (5.) In the Case of Buildings connected by Arches or Communications over Public Ways or over Passages belonging to other Persons, a Right to pull down such of the said Buildings, Arches, or Communications, or any Part thereof, as are not built in conformity with this Act, and to rebuild the same in conformity with this Act :
- (6.) A Right to raise any Party Structure permitted by this Act to be raised, or any external Wall built against such Party Structure, upon Condition of making good all Damage occasioned thereby to the adjoining Premises or to the internal Finishings and Decorations thereof, and of carrying up to the requisite Height all Flues and Chimney Stacks belonging to the Adjoining Owner on or against such Party Structure or External Wall :
- (7.) A Right to pull down any Party Structure that is of insufficient Strength for any Building intended to be built, and to rebuild the same of sufficient Strength for the above Purpose, upon Condition of making good all Damage occasioned thereby to the adjoining Premises, or to the internal Finishings and Decorations thereof
- (8.) A Right to cut into any Party Structure upon Condition

of making good all Damage occasioned to the adjoining Premises by such Operation

- (9.) A Right to cut away any Footing or any Chimney Breasts, Jambs, or Flues projecting from any Party Wall, in order to erect any External Wall against such Party Wall, or for any other Purpose, upon Condition of making good all Damage occasioned to the adjoining Premises by such Operation
- (10.) A Right to cut away or take down such Parts of any Wall or Building of an Adjoining Owner as may be necessary in consequence of such Wall or Building overhanging the Ground of the Building Owner, in order to erect an upright Wall against the same, on Condition of making good any Damage sustained by the Wall or Building by reason of such cutting away or taking down
- (11.) A Right to perform any other necessary Works incident to the Connexion of Party Structure with the Premises adjoining thereto

But the above Rights shall be subject to this Qualification, that any Building which has been erected previously to the Time of this Act coming into operation shall be deemed to be conformable with the Provisions of this Act if it is conformable with the Provisions of an Act passed in the Fourteenth Year of His late Majesty King *George* the Third, Chapter Seventy-eight, or with the Provisions of the said Act of the Eighth Year of Her present Majesty, Chapter Eighty four

**Rights of Ad-
joining Owner**

LXXXIV. Whenever the Building Owner proposes to exercise any of the foregoing Rights with respect to Party Structures the Adjoining Owner may require the Building Owner to build on any such Party Structure certain Chimney Jambs, Breasts, or Flues, or certain Piers or Recesses, or any other like Works for the Convenience of such Adjoining Owner, and it shall be the duty of the Building Owner to comply with such Requisition in all Cases where the Execution of the required Works will not be injurious to the Building Owner, or cause to him unnecessary Inconvenience or unnecessary Delay in the Exercise of his Right; and any Difference that arises between any Building Owner and Adjoining Owner in respect of the Execution of such Works as aforesaid shall be determined in manner in which Differences between Building Owners and Adjoining Owners are herein-after directed to be determined

**Rules as to
Exercise of
Rights by
Building and
Adjoining
Owners.**

LXXXV The following Rules shall be observed with respect to the Exercise by Building Owners and Adjoining Owners of their respective Rights :—

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- (1.)** No Building Owner shall, except with the Consent of the Adjoining Owner, or in Cases where any Party Structure is dangerous, in which Cases the Provisions hereby made as to dangerous Structures shall apply, exercise any Right hereby given in respect of any Party Structure, unless he has given at the least Three Months' previous Notice to the Adjoining Owner by delivering the same to him personally, or by sending it by Post in a registered Letter addressed to such Owner at his last known Place of Abode:
- (2)** The Notice so given shall be in Writing or printed, and shall state the nature of the proposed Work, and the Time at which such Work is proposed to be commenced
- (3)** No Building Owner shall exercise any Right hereby given to him in such Manner or at such Time as to cause unnecessary Inconvenience to the adjoining Owner
- (4)** Upon the Receipt of such Notice the Adjoining Owner may require the Building Owner to build or may himself build on any such Party Structure any Works to the Construction of which he is herein-before mentioned to be entitled:
- (5)** Any Requisition so made by an Adjoining Owner shall be in Writing or printed, and shall be delivered personally to the Building Owner within One Month after the Date of the Notice being given by him, or be sent by Post in a registered Letter addressed to him at his last known Place of Residence It shall specify the Works required by the Adjoining Owner for his Convenience, and shall, if necessary, be accompanied with explanatory Plans and Drawings
- (6)** If either Owner does not, within Fourteen Days after the Delivery to him of any Notice or Requisition, express his Consent thereto, he shall be considered as having dissented therefrom, and thereupon a Difference shall be deemed to have arisen between the Building Owner and the Adjoining Owner :
- (7.)** In all Cases not hereby specially provided for where a Difference arises between a Building Owner and Adjoining Owner in respect of any Matter arising under this Act, unless both Parties concur in the Appointment of One Surveyor they shall each appoint a Surveyor, and the Two Surveyors so appointed shall select a Third Surveyor, and such One Surveyor, or Three Surveyors, or any Two of them, shall settle any Matter in Dispute between such Building and Adjoining Owner, with

Power by his or their Award to determine the Right to do, and the Time and Manner of doing any Work, and generally any other Matter arising out of or incidental to such Difference, but any Time so appointed for doing any Work shall not commence until after the Expiration of such Period of Three Months, as is herein-before mentioned.

- (8.) Any Award given by such One Surveyor, or by such Three Surveyors, or any Two of them, shall be conclusive, and shall not be questioned in any Court, with this Exception, that either of the Parties to the Difference may appeal therefrom to the County Court within Fourteen Days from the Date of the Delivery of any such Award as aforesaid, and such County Court may, subject as herein-after mentioned, rescind or modify the Award so given in such Manner as it thinks just.
- (9.) If either Party to the Difference makes default in appointing a Surveyor for Ten Days after Notice has been given to him by the other Party in manner aforesaid to make such Appointment, the Party giving the Notice may make the Appointment in the Place of the Party so making default:
- (10.) The Costs incurred in obtaining any such Award as aforesaid shall be paid by such Party as such One Surveyor, or Three Surveyors, or any Two of them may determine
- (11.) If the Appellant from any such Award as aforesaid, on appearing before the County Court, declares his Unwillingness to have the Matter decided by such Court, and proves to the Satisfaction of the Judge of such Court that in the event of the Matter being decided against him he will be liable to pay a Sum, exclusive of Costs, exceeding Fifty Pounds, and gives Security, to be approved by such Judge, duly to prosecute his Appeal and to abide the Event thereof, all Proceedings in the County Court shall thereupon be stayed; and it shall be lawful for such Appellant to bring an Action in One of Her Majesty's Superior Courts of Law at *Westminster* against the other Party to the Difference, and the Plaintiff in such Action shall deliver to the Defendants an Issue or Issues whereby the Matters in difference between them may be tried, and the Form of such Issue or Issues, in case of Dispute, or in case of the Nonappearance of the Defendant, shall be settled by the Court in which the Action is brought, and such Action shall be prosecuted

and Issue or Issues tried in the same Manner and subject to the same Incidents in and subject to which Actions are prosecuted and Issues tried in other Cases within the Jurisdiction of such Court, or as near thereto as Circumstances admit :

- (12.) If the Parties to any such Action agree as to the Facts a special Case may be stated for the Opinion of any such Superior Court as aforesaid, and any Case so stated may be brought before the Court in like Manner and subject to the same Incidents in and subject to which other special Cases are brought before such Court, or as near thereto as Circumstances admit, and any Costs that may have been incurred in the County Court by the Parties to such Action as is mentioned in this Section shall be deemed to be Costs incurred in such Action, and be payable accordingly

LXXXVI Whenever any Building Owner has become entitled, in pursuance of this Act, to execute any Work, it shall be lawful for him, his Servants, Agents, or Workmen, at all usual Times of working, to enter on any Premises, for the Purpose of executing and to execute such Work, removing any Furniture, or doing any other Thing that may be necessary, and if such Premises are closed he or they may, accompanied by a Constable or other Officer of the Peace, break open any Doors in order to such Entry, and any Owner or other Person that hinders or obstructs any Workman employed for any of the Purposes aforesaid, or wilfully damages or injures the said Work, shall incur for every such Offence a Penalty not exceeding Ten Pounds, to be recovered before a Justice of the Peace

Power for Building Owner to make Entry on Premises to effect Works

Penalty on Persons obstructing

LXXXVII Any Adjoining Owner may, if he thinks fit, by Notice in Writing given by himself or his Agent, require the Building Owner, before commencing any Work which he may be authorized by this Act to execute, to give such Security as may be agreed upon, or in case of Difference may be settled by the Judge of the County Court, for the Payment of all such Costs and Compensation in respect of such Work as may be payable by such Building Owner.

Security to be given by Building Owner, if required by Adjoining Owner

LXXXVIII. The following Rules shall be observed as to Expenses in respect of any Party Structure, (that is to say,)

Rules as to Expenses in respect of Party Structure.

As to Expenses to be borne jointly by the Building Owner and Adjoining Owner :

- (1.) If any Party Structure is defective or out of repair the Expense of making good or repairing the same shall be

borne by the Building Owner and Adjoining Owner in due Proportion, regard being had to the Use that each Owner makes of such Structure :

- (2.) If any Party Structure is pulled down and rebuilt by reason of its being so far defective or out of repair as to make it necessary or desirable to pull down the same, the Expense of such pulling down and rebuilding shall be borne by the Building Owner and Adjoining Owner in due Proportion, regard being had to the Use that each Owner makes of such Structure
- (3.) If any Timber or other Partition dividing any Building is pulled down, in exercise of the Right herein-before vested in a Building Owner, and a Party Structure built instead thereof, the Expense of building such Party Structure, and also of building any additional Party Structures that may be required by reason of such Partition having been pulled down, shall be borne by the Building Owner and Adjoining Owner in due Proportion, regard being had to the Use that each Owner makes of such Party Structure, and to the Thickness required to the respective Buildings parted thereby :
- (4.) If any Room or Stories, or any Part of Rooms or Stories, the Property of different Owners, and intermixed in any Building, are pulled down in pursuance of the Right herein-before vested in any Building Owner, and rebuilt in conformity with this Act, the Expense of such pulling down and rebuilding shall be borne by the Building Owner and Adjoining Owner in due Proportion, regard being had to the Use that each Owner makes of such Rooms or Stories
- (5.) If any Arches or Communications, or any Parts thereof, are pulled down in pursuance of the Right herein-before vested in any Building Owner, and rebuilt in conformity with this Act, the Expense of such pulling down and rebuilding shall be borne by the Building Owner and Adjoining Owner in due Proportion, regard being had to the Use that each Owner makes of such Arches or Communications

As to Expenses to be borne by Building Owner

- (6.) If any Party Structure or External Wall built against the same is raised in pursuance of the Power herein-before vested in any Building Owner, the Expense of raising the same, and of making good all such Damage, and

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of carrying up to the requisite Height all such Flues and Chimnies as are herein-before required to be made good and carried up, shall be borne by the Building Owner .

(7.) If any Party Structure which is of proper Materials and sound, or not so far defective or out of repair as to make it necessary or desirable to pull down the same, is pulled down and rebuilt by the Building Owner, the Expense of pulling down and rebuilding the same, and of making good all such Damage as is herein-before required to be made good, shall be borne by the Building Owner :

(8.) If any Party Structure is cut into by the Building Owner, the Expense of cutting into the same, and of making good any Damages herein-before required to be made good, shall be borne by such Building Owner

(9.) If any Footing, Chimney Breast, Jambs, or Floor is cut away in pursuance of the Powers herein-before vested in any Building Owner, the Expense of such cutting away, and of making good any Damage herein-before required to be made good, shall be borne by the Building Owner.

LXXXIX. Within one Month after the Completion of any Work which any Building Owner is by this Act authorized or required to execute, and the Expense of which is in whole or in part to be borne by an Adjoining Owner, such Building Owner shall deliver to the Adjoining Owner an Account in Writing of the Expense of the Work, specifying any Deduction to which such Adjoining Owner or other Person may be entitled in respect of old Materials, or in other respects, and every such Work as aforesaid shall be estimated and valued at fair average Rates and Prices, according to the Nature of the Work and the Locality, and the Market Price of Materials and Labour at the Time.

Account of Expenses of Work to be delivered to Adjoining Owner within One Month.

XC At any Time within One Month after the Delivery of such Account, the Adjoining Owner, if dissatisfied therewith, may declare his Dissatisfaction to the Party delivering the same, by Notice in Writing given by himself or his Agent, and specifying his Objections thereto, and upon such Notice having been given a Difference shall be deemed to have arisen between the Parties, and such Difference shall be determined in manner herein-before provided for the Determination of Differences between Building and Adjoining Owners.

Adjoining Owner may appeal against Account

XCI If within such Period of One Month as aforesaid the Party receiving such Account does not declare in manner aforesaid his Dissatisfaction therewith, he shall be deemed to have accepted the

Building Owner may recover, if no Appeal made

same, and shall pay the same, on Demand, to the Party delivering the Account, and if he fails to do so the Amount so due may be recovered as a Debt

Penalty on
Delay of Pay-
ment by Adjoin-
ing Owner

XCII Where the Adjoining Owner is liable to contribute to the Expenses of building any Party Structure, until such Contribution is paid, the Building Owner at whose Expense the same was built shall stand possessed of the sole Property in such Structure.

As to Expenses
incurred on Re-
quisition of Ad-
joining Owner

XCIII Where any Building Owner has incurred any Expenses on the Requisition of an Adjoining Owner, the Adjoining Owner making such Requisition shall be liable for all such Expenses, and in default of Payment the same may be recovered from him as a Debt

Penalty on
Building Owner
failing to
execute re-
quired Works

XCIV Where any Building Owner is, by the Third Part of this Act, liable to make good any Damage he may occasion to the Property of the Adjoining Owner by any Works authorized to be executed by him, or to do any other Thing upon Condition of doing which his Right to execute such Works is hereby limited to arise, and such Building Owner fails within a reasonable Time to make good such Damage or to do such Thing, he shall incur a Penalty, to be recovered before a Justice of the Peace, not exceeding Twenty Pounds for each Day during which such Failure continues

Consent how
given on behalf
of Persons under
Disability

XCV Where, in pursuance of this Act, any Consent is required to be given, any Notice to be served, or any other Thing to be done by, on, or to any Owner under Disability, such Consent may be given, such Notice may be served, and such Thing may be done by, on, or to the following Persons, on behalf of such Persons under Disability, that is to say,

By, on, or to a Husband, on behalf of his Wife

By, on, or to a Trustee, on behalf of his Cestuique Trust.

By, on, or to a Guardian or Committee, on behalf of an Infant, Idiot, or Lunatic

Consent how
given on behalf
of Persons not
to be found

XCVI Where any Consent is required to be given or any other Thing to be done by any Owner in pursuance of this Act, if there is no Owner capable of giving such Consent or of doing such Thing, and no Person empowered by this Act to give such Consent or to do such Thing on behalf of such Owner, or if any Owner so capable, or any Person so empowered, cannot be found, the Judge of the County Court shall have Power to give such Consent or do or cause to be done such Thing on behalf of such Owner, upon such Terms and subject to such Conditions as he may think fit, having regard alike to the Nature and Purpose of the Subject

Matter in respect of which such Consent is to be given, and to the fair Claims of the Parties on whose Behalf such Consent is to be given, and such Judge shall have Power to dispense with the Service of any Notice which would otherwise be required to be served.

PART IV.

PART IV.

MISCELLANEOUS PROVISIONS.

Provisions

XCVII. Where it is hereby declared that Expenses are to be borne by the Owner of any Premises (including in the Term "Owner" the Adjoining and Building Owner respectively), the following Rules shall be observed with respect to the Payment of such Expenses :

Payment of Expenses by Owners.

- (1) The Owner immediately entitled in possession to such Premises, or the Occupier thereof, shall in the first instance pay such Expenses, with this Limitation, that no Occupier shall be liable to pay any Sum exceeding in Amount the Rent due or that will thereafter accrue due from him in respect of such Premises during the Period of his Occupancy
- (2) If there are more Owners than One, every Owner shall be liable to contribute to such Expenses in proportion to his Interest :
- (3) If any Difference arises as to the Amount of Contribution, such Difference shall be decided by Arbitration, to be conducted in manner directed by the Companies Clauses Consolidation Act, 1845, and for that Purpose the Clauses of the said Act with respect to the Settlement of Disputes by Arbitration shall be incorporated with this Act :
- (4) If some of the Owners liable to Contribution cannot be found, the Deficiency so arising shall be divided amongst the Parties that can be found
- (5.) Any Occupier of Premises who has paid any Expenses under this Act may deduct the Amount so paid from any Rent payable by him to any Owner of the same Premises, and any Owner of Premises who has paid more

than his due Proportion of any Expenses may deduct the Amount so overpaid from any Rent that may be payable by him to any other Owner of the same Premises

- (6) If Default is made by any Owner or Occupier in Payment of any Expenses hereby made payable by him in the first instance, or if Default is made by any Owner in Payment of any other Expenses or Monies due from him by way of Contribution or otherwise in pursuance of this Act, then in addition to any other Remedies hereby provided such Expenses and Monies, if arising in respect of any Matter within the Provisions of the Third Part of this Act, may be recovered as a Debt in due Course of Law, but if arising in respect of any other Matter under this Act may be recovered in a summary Manner.

Rules as to
Service of
Notices, Sum-
monses, and
Orders.

XCVIII. The following Rules shall be observed with respect to the giving or Service of any Notice, Summons, or Order directed to be given or served under this Act in Cases not herein-before provided for :

- (1) A Notice, Summons, or Order may in all Cases be served personally :
- (2) A Notice, Summons, or Order may be served on any Builder by leaving the same or sending it in a registered Letter addressed to him at his Place of Address as stated by him to the District Surveyor, or by putting up such Notice, Summons, or Order on a conspicuous Part of the Building or Premises to which the same relates :
- (3) A Notice, Summons or Order may be served on the Owner or Occupier of any Premises by leaving the same with the Occupier of such Premises, or with some Inmate of his Abode, or if there is no Occupier by putting up such Notice, Summons, or Order on a conspicuous part of the Building or Premises to which the same relates, and it shall not be necessary to name the Owner or Occupier of such Premises, nevertheless, when the Owner of any such Premises and his Residence, or that of his Agent, are known to the Party by whom or on whose Behalf any Notice, Summons, or Order is intended to be served, it shall be the duty of such Party to send every such Notice, Summons, or Order by the Post in a registered Letter addressed to the Residence or last known Residence of such Owner or of his Agent :
- (4.) A Notice, Summons, or Order may be served on any District Surveyor by leaving the same at his Office.

XCIX Whenever any Thing is hereby authorised to be done by a County Court it may be done as follows, that is to say, if such Thing arises in respect of any Structure or other Subject Matter situate within the City of *London* or the Liberties thereof, by the Sheriffs Court established by a Local Act passed in the Eleventh Year of the Reign of Her Majesty, Chapter Seventy-one, intituled *An Act for the more easy Recovery of Small Debts and Demands within the City of London, or the Liberties thereof*, and if such Thing arises in respect of any Structure or other Subject Matter situate elsewhere, by the County Court having Jurisdiction within the District in which such Structure or other Subject Matter is situate

As to Things authorized to be done by a County Court

11 & 12 Vict., c. lxxi.

C In Cases where Jurisdiction is hereby given to a County Court, such Court may from Time to Time make such Order in respect of Matters so brought before it as it may think fit, with Power to settle the Time and Manner of executing any Work, or of doing any other Thing, and to put the Parties to the Case upon such Terms as respects the Execution of the Work as it thinks fit: It shall also have Power to award or refuse Costs according to Circumstances, and to settle the Amount thereof

Manner of determining Differences

CI Proceedings in any County Court in respect of any Matter arising under this Act shall be conducted in the same Manner as Proceedings are conducted in any Case within the ordinary Jurisdiction of such Court, or as near thereto as Circumstances permit, and Orders made by the Judge of any such Court may be enforced by Execution, Committal, or otherwise, in a similar Manner to that in which the Orders of such Court are ordinarily enforced.

Form of Proceedings in County Court.

CII If either Party in any Case over which Jurisdiction is hereby given to a County Court feels aggrieved with the decision of such Court in respect of any Point of Law, or the Admission or Rejection of any Evidence, he may appeal therefrom in the same Manner and upon the same Terms in and upon which he might have appealed from the Decision of such Court in any Case within the ordinary Jurisdiction of such Court, or as near thereto as Circumstances permit, but no such Appeal shall be allowed unless the Value of the Matter in difference between the Parties exceeds Fifty Pounds, and the Opinion of the Judge before whom the Case is tried as to such Value shall be conclusive.

Appeal from Decision of County Court

CIII All Penalties under this Act, and all Fees, Monies, Costs, or Expenses by this Act directed to be recovered in a summary Manner, may be recovered in Manner directed by an Act passed in the Eleventh and Twelfth Years of the Reign of Her present Majesty Queen *Victoria*, Chapter Forty-three, intituled *An Act to*

Recovery of Penalties.

facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders, and whenever any Thing is hereby authorized or required to be done by or before a Justice of the Peace it may be done as follows, that is to say, if such Thing arises in respect of any Building or Wall situate within the City of London, by or before One or more Justice or Justices of the Peace for the said City or by any Metropolitan Police Magistrate, and if such Thing arises in respect of any Building or Wall situate elsewhere within the Limits of this Act, by or before any Metropolitan Police Magistrate.

Application of Penalties

CIV Any Justice of the Peace in any Case over which Jurisdiction is hereby given to him may make such Order as to the Costs of any Proceedings of which he has Cognizance as he thinks just, he may also direct the whole or any Part of any Penalty imposed by him under this Act to be applied in or towards Payment of the Costs of the Proceedings, and, subject to such Direction, all Penalties shall be paid into the Hands of the Treasurer of the said Metropolitan Board, to be applied in such Manner as the said Board thinks fit.

Provisions as to Limitation of Time when due Notice has not been given

CV In Cases where any Building has been erected or Work done without due Notice being given to the District Surveyor, the District Surveyor may, at any Time within One Month after he has discovered that such Building has been erected or Work done, enter the Premises for the Purpose of seeing that the Regulations of this Act have been complied with, and the Time during which the District Surveyor may take any Proceeding, or do anything authorized or required by this Act to be done by him, in respect of such Building or Work, shall begin to run from the Date of his discovering that such Building has been erected or Work done.

Power to appeal to Superior Courts

CVI In every Case, except in respect of Fees of a District Surveyor, in which Jurisdiction is herein-before given to a Justice of the Peace, if either Party to any such Case is dissatisfied with the Determination of the Justice so convicting, in respect of any Point of Law, or of the Admission or Rejection of any Evidence, such Party may, upon giving Notice within Seven Days to the other Party of his Intention to appeal, appeal therefrom to any of the Superior Courts of Common Law at *Westminster*, subject to this Restriction, that no such Appeal shall be made by any District Surveyor except with the Consent of the Justice before whom the Case is tried, and that no such Appeal shall be made by any other Party to the Case except upon giving such Security for Costs, and, if the Case requires it, in addition thereto, such Undertaking in

respect of desisting in the meantime from any Works complained of, or in respect of any other Matter or Thing arising in the Case, as the Justice thinks fit.

CVII. Any Appeal so made shall be in the Form of a Special Form of Appeal Case, to be agreed on by both Parties, or, if the Parties cannot agree, to be settled by the Justice from whose Decision the Appeal is made, and such Case shall be transmitted by the Appellant to the Rule Department of the Master's Office in the Court in which the Appeal is to be brought, and be heard in manner provided by the Practice of such Court.

CVIII. No Writ or Process shall be sued out against any Notice of Action. District Surveyor or other Person for anything done or intended to be done under the Provisions of this Act until the Expiration of One Month next after Notice in Writing has been delivered to him or left at his Office or usual Place of Abode, stating the Cause of Action, and the Name and Place of Abode of the intended Plaintiff, and of his Attorney or Agent in the Cause, and upon the Trial of any such Action the Plaintiff shall not be permitted to go into Evidence of any Cause of Action which is not stated in such last-mentioned Notice, and unless such Notice is proved the Jury shall find for the Defendant; and every such Action shall be brought or commenced within Six Months next after the Accrual of the Cause of Action, and not afterwards, and shall be laid and tried in the County or Place where the Cause of Action occurred, and not elsewhere, and the Defendant shall be at Liberty to plead the General Issue, and give this Act and all Special Matter in Evidence thereunder.

PART V.

REPEAL OF FORMER ACTS, AND TEMPORARY PROVISIONS.

PART V

Repeal of former Acts and temporary Provisions

REPEAL.

CIX From and after the Commencement of this Act, the following Acts, that is to say, an Act passed in the Eighth Year of the Reign of Her present Majesty, Chapter Eighty-four, and intituled *An Act for regulating the Construction and the Use of Buildings in the Metropolis and its Neighbourhood*, with the Exception of the Sections relating to dangerous and noxious Businesses,

Repeal of 8 and 9 Vict c 84, except ss 54 to 63, and 9 and 10 Vict c 5.

and numbered respectively Fifty-four, Fifty-five, Fifty-six, Fifty-seven, Fifty-eight, Fifty-nine, Sixty, Sixty-one, Sixty-two, and Sixty-three, and an Act passed in the Ninth Year of the Reign of Her present Majesty, Chapter Five, and intituled *An Act to amend an Act for regulating the Construction and Use of Buildings in the Metropolis and its Neighbourhood*, are throughout the Limits of this Act and elsewhere hereby repealed, subject to the following Provisions, that is to say,

1. That such Repeal shall not affect any Proceedings authorized to be taken by the said Acts or either of them in respect of any Act, Omission, Penalty, Matter, or Thing, and pending before the Official Referees or any other Tribunal at the Time of the Commencement of this Act :
- 2 That in Cases where any Act, Omission, or Thing has occurred previously to the Time of the Commencement of this Act, in respect of which, if this Act had not passed, Proceedings might have been taken under the said Acts or either of them, then Proceedings in respect of such Act, Omission, or Thing may be had under this Act in manner following, that is to say, if the Matter in question is anything relating to the Rights of Building and Adjoining Owners in respect of Party Structures, Proceedings may be had in the County Court, but if the Matter in question relates to the Recovery of any Penalty or to any other Thing, Proceedings may be had before any Justice of the Peace :
3. That so much of the Act of the Fourteenth Year of King George the Third, Chapter Seventy-eight, as was excepted from the Operation of the said Act of the Eighth Year of Her present Majesty, Chapter Eighty-four, (that is to say,) the Sections numbered respectively Seventy-four, Seventy-five, Seventy-six, Seventy-seven, Seventy-eight, Eighty, Eighty-one, Eighty-two, Eighty-three, Eighty-four, Eighty-five, and Eighty-six, shall continue in full force.

As to Contracts
made previously
to passing of
Act.

CX. Any Contract made previously to the passing of this Act for the Erection of a new Building shall be carried into effect in the same Manner as if this Act had been passed at the Time of the making thereof, and the necessary Deviations from the Terms of such Contract may be made accordingly ; and if any Dispute arises in respect of any Loss sustained by any Party to such Contract by reason of such necessary Deviation, such Dispute shall be determined by the County Court ; and whenever any Costs or

Expenses have been paid by any Owner in pursuance of this Act, then as to any Structure held under any Lease or Agreement made previously to the Commencement of this Act it shall be lawful for such Owner to recover the same from the Persons hitherto liable by Law, or by such existing Lease or Contract, to maintain or repair the Structure in respect of which such Costs and Expenses have been incurred.

CXI Nothing herein contained shall vary or affect the Rights or Liabilities as between Landlord and Tenant under any Contract between them.

Liabilities under Contract between Landlord and Tenant not to be affected

CXII. In Cases where any Iron Building has been constructed or is in the Progress of Construction previously to the Time at which this Act comes into operation, and Doubts are entertained whether such Building is permitted by Law, any Person interested in such Building may make an Application to the Commissioners of Works and Buildings, to signify their Approval of such Building, and the Commissioners of Works and Buildings, upon being satisfied of the Stability of such Building, may approve of the same, and upon such Approval being given such Building shall be deemed to have been constructed in manner permitted by Law, and this Section shall come into operation immediately after the passing of this Act.

As to Iron Buildings constructed before this Act comes into operation

CXIII The Official Referees and Registrar of Metropolitan Buildings may, within Six Months from the Time at which this Act comes into operation, apply to the Commissioners of Her Majesty's Treasury for Compensation in respect of the Loss they have sustained by reason of the Abolition of their Offices, and the Commissioners shall take any such Application into consideration, and award such Compensation, either by way of a gross Sum or annual Payment, as they think just, having regard to the Nature of the Office, the Time during which the Applicant has held the same, and generally to the special Circumstances of each Case; and any Compensation so given shall be paid out of Monies to be provided by Parliament, and such Compensation, when made by annual Payment, shall be subject to this Proviso, that if any such Official Referee or Registrar is at any Time thereafter appointed to any Public Office in respect of which he receives a Salary, the Payment of the Compensation awarded to him under this Act shall be suspended so long as he receives such Salary, if the Amount thereof is greater than such Compensation, or if not shall be diminished by the Amount of such Salary.

Compensation of Official Referees and Registrar

CXIV Any Person, except the said Official Referees and Registrar, who at the Time when this Act comes into operation is

Compensation of Clerks in Office of Metropolitan Buildings.

employed in the Office of Metropolitan Buildings, may within Six Months from such Time apply to the Metropolitan Board of Works for Employment, and such Board shall thereupon take such Application into consideration, and they shall either employ the Applicant at a Salary not less in Amount than that which he enjoyed when in the said Office of Metropolitan Buildings, or at a less Salary awarding to him Compensation in respect of such Diminution of Salary, or they shall award to him such Compensation, if any, as they, or in the event of the Applicant feeling aggrieved with their Decision, as the Commissioners of the Treasury think just, having regard to the Nature of the Office, the Time during which it has been held by the Applicant, and generally to the special Circumstances of the Case, and any Expenses incurred by the said Board in carrying into effect this Section shall be deemed to be Expenses incurred in the Execution of the said Act for the better Local Management of the Metropolis, and be raised accordingly, nevertheless, if any such Clerk or Servant as aforesaid at any Time thereafter is appointed to any Public Office, or to any Office under the said Metropolitan Board, in respect of which he receives a Salary, the Payment of the Compensation awarded to him under this Act shall be suspended so long as he receives such Salary, if the Amount thereof is greater than the Amount of such Compensation, or if not shall be diminished by the Amount of such Salary, but, notwithstanding anything herein contained, the Metropolitan Board may, in the event of their employing any Person mentioned in this Section, dismiss him, with the Consent of the Treasury.

FIRST SCHEDULE.

PRELIMINARY.

Structure of Buildings

1 Every Building shall be enclosed with Walls constructed of Brick, Stone, or other hard and incombustible Substances, and the Foundations shall rest on the solid Ground, or upon Concrete or upon other solid Substructure

Construction of Walls of Brick, Stone, &c

2 Every Wall constructed of Brick, Stone, or other similar Substances shall be properly bonded and solidly put together with Mortar or Cement, and no Part of such Wall shall overhang any Part underneath it, and all Return Walls shall be properly bonded together.

3 The Thickness of every Stone Wall in which the Beds of the Masonry are not laid horizontally shall be One Third greater than the Thickness prescribed for Stone Walls in the Rules herein-after contained Extra Thickness of certain Stone Walls.

4 The Thickness of every Wall as herein-after determined shall be the minimum Thickness Thickness of Walls

5. The Height of every topmost Story shall be measured from the Level of its Floor up to the under Side of the Tie of the Roof, or up to Half the vertical Height of the Rafters, when the Roof has no Tie, and the Height of every other Story shall be the clear Height of such Story exclusive of the Thickness of the Floor. Height of Story

6 The Height of every External and Party Wall shall be measured from the Base of the Wall to the Level of the Top of the topmost Story Height of External and Party Walls

7 Walls are deemed to be divided into distinct Lengths by Return Walls, and the Length of every Wall is measured from the Centre of one Return Wall to the Centre of another, provided that such Return Walls are External, Party, or Cross Walls of the Thickness herein after required, and bonded into the Walls so deemed to be divided Length of Walls.

8 The Projection of the Bottom of the Footing of every Wall, on each Side of the Wall, shall be at least equal to One Half of the Thickness of the Wall at its Base, and the Diminution of the Footing of every Wall shall be formed in regular Offsets, and the Height from the Bottom of such Footing to the Base of the Wall shall be at the least equal to One Half of the Thickness of the Wall at its Base. Footings of Walls

PART I.

RULES FOR THE WALLS OF DWELLING HOUSES.

1 The External and Party Walls of Dwelling Houses shall be made throughout the different Stories of the Thickness shown in the following Table, arranged according to the Heights and Lengths of the Walls, and calculated for Walls up to One Hundred Feet in Height, and supposed to be built of Bricks not less than Eight and a Half Inches and not more than Nine and a Half Inches in Length, the Heights of the Stories being subject to the Condition herein-after given. Thickness of Walls of Dwelling Houses

2. TABLE.

I.	II.	III.	IV.
Height up to 100 Feet.	Length up to 45 Feet Two Stories, 21½ Inches Three Stories, 17½ Inches Remainder, 13 Inches	Length up to 80 Feet Two Stories, 25 Inches Two Stories, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length unlimited. One Story, 30 Inches. Two Stories, 26 Inches. Two Stories 21½ Inches. Two stories 17½ Inches Remainder, 13 Inches
Height up to 90 Feet	Length up to 45 Feet Two Stories, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length up to 70 Feet One Story, 26 Inches Two Stories, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length unlimited. One Story, 30 Inches Two Stories 26 Inches One Story 21½ Inches Two stories, 17½ Inches Remainder, 13 Inches
Height up to 80 Feet	Length up to 40 Feet One Story, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length up to 60 Feet Two Stories, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length unlimited. One Story, 26 Inches Two Stories 21½ Inches Two Stories 17½ Inches Remainder, 13 Inches
Height up to 70 Feet	Length up to 40 Feet Two Stories, 17½ Inches Remainder, 13 Inches	Length up to 55 Feet One Story, 21½ Inches Two Stories, 17½ Inches Remainder, 13 Inches	Length unlimited. One Story, 26 Inches Two Stories 21½ Inches. One Story 17½ Inches Remainder, 13 Inches
Height up to 60 Feet.	Length up to 30 Feet One Story, 17½ Inches Remainder, 13 Inches.	Length up to 50 Feet Two Stories, 17½ Inches Remainder, 13 Inches	Length unlimited. One Story 21½ Inches Two Stories 17½ Inches. Remainder, 13 Inches.
Height up to 50 Feet.	Length up to 30 Feet Wall below the Topmost Story, 13 Inches Topmost Story, 8½ Inches Remainder, 8½ Inches.	Length up to 45 Feet One Story, 17½ Inches Rest of Wall below Topmost Story, 13 Inches Topmost Story, 8½ Inches Remainder, 8½ Inches.	Length unlimited. One Story 21½ Inches. One Story 17½ Inches Remainder, 13 Inches.

2 TABLE—(continued).

I	II.	III.	IV.
Height up to 40 Feet.	Length up to 35 feet Wall below Two Topmost Stories, 13 Inches Two Topmost Stories, 8½ Inches Remainder, 8½ Inches.	Length unlimited. One Story, 17½ Inches Rest of Wall below Topmost Story, 13 Inches Topmost Story, 8½ Inches. Remainder, 8½ Inches.	
Height up to 30 Feet.	Length up to 35 Feet Wall below Two Topmost Stories, 13 Inches Two Topmost Stories, 8½ Inches Remainder, 8½ Inches.	Length unlimited Wall below Topmost Story, 13 Inches. Topmost Story, 8½ Inches. Remainder, 8½ Inches	
Height up to 25 Feet	Length up to 30 Feet From Base to Top of Wall, 8½ Inches	Length unlimited. Wall below Topmost Story, 13 Inches Topmost Story 8½ Inches Remainder, 8½ Inches	

3 In using the above Table the Height of the Wall is to be reckoned on the First vertical Column on the Left Hand of the Table, and the Length of the Wall on the corresponding horizontal Column The Thickness of the Wall in each Story is given in Inches, and begins with the Wall from the Base upwards.

Explanation of Tables.

4 If any External or Party Wall, measured from Centre to Centre, is not more than Twenty-five Feet distant from any other External or Party Wall to which it is tied by the Beams of any Floor or Floors, other than the Ground Floor, or the Floor of any Story formed in the Roof, the Length of such Wall is not to be taken into consideration, and the Thickness of the Wall will be found in the Second vertical Column in the above Table.

Qualification in case of certain Walls

5 If any Story exceeds in Height Sixteen Times the Thickness prescribed for the Walls of such Story in the above Table, the Thickness of each External and Party Wall throughout such Story shall be increased to One Sixteenth Part of the Height of the Story, but any such additional Thickness may be confined to Piers properly distributed, of which the collective Widths amount to One Fourth Part of the Length of the Wall.

Condition in respect of Stories exceeding a certain Height.

Restriction in case of certain Stories.

6 No Story enclosed with Walls less than Thirteen Inches in Thickness shall be more than Ten Feet in Height.

Thickness of Walls built of Materials other than such Bricks as aforesaid

7. The Thickness of any Wall of a Dwelling House, if built of Materials other than such Bricks as aforesaid, shall be deemed to be sufficient if made of the Thickness required by the above Tables, or of such less Thickness as may be approved by the Metropolitan Board, with this Exception, that in the Case of Walls built of Stone in which the Beds of the Masonry are not laid horizontally no Diminution shall be allowed in the Thickness required by the foregoing Rules for such last-mentioned Walls

Rule as to Buildings not being Public Buildings or Buildings of the Warehouse Class.

8. All Buildings, excepting Public Buildings, and such Buildings as are herein-after defined to be Buildings of the Warehouse Class, shall, as respects the Thickness of their Walls, be subject to the Rules given for Dwelling Houses

PART II.

RULES FOR THE WALLS OF BUILDINGS OF THE WAREHOUSE CLASS.

Definition of Warehouse Class.

1 The Warehouse Class shall comprise all Warehouses, Manufactories, Breweries, and Distilleries

Thickness at Base

2 The External and Party Walls of Buildings of the Warehouse Class shall at the Base be made of the Thickness shown in the following Table, calculated for Walls up to One hundred Feet in Height, and supposed to be built of Bricks not less than Eight and a Half Inches and not more than Nine and a Half Inches in Length

3 TABLE.

I	II	III	IV
Height up to 100 Feet	Length up to 55 Feet Base, 26 Inches	Length up to 70 Feet Base, 30 Inches	Length unlimited Base, 34 Inches
Height up to 90 Feet	Length up to 60 Feet Base, 26 Inches	Length up to 70 Feet Base, 30 Inches	Length unlimited Base, 34 Inches
Height up to 80 Feet	Length up to 45 Feet. Base, 21½ Inches.	Length up to 60 Feet Base, 26 Inches.	Length unlimited Base, 30 Inches.

3. TABLE—(continued)

I	II	III	IV
Height up to 70 Feet	Length up to 30 Feet Base, 17½ Inches	Length up to 45 Feet Base, 21½ Inches	Length unlimited. Base, 26 Inches.
Height up to 60 Feet	Length up to 35 Feet. Base, 17½ Inches	Length up to 50 Feet Base, 21½ Inches	Length unlimited. Base, 26 Inches.
Height up to 50 Feet	Length up to 40 Feet Base, 17½ Inches	Length up to 70 Feet Base, 21½ Inches	Length unlimited. Base, 26 Inches
Height up to 40 Feet	Length up to 30 Feet Base, 13 Inches	Length up to 60 Feet Base, 17½ Inches	Length unlimited. Base, 21½ Inches.
Height up to 30 Feet	Length up to 45 Feet Base, 13 Inches	Length unlimited. Base, 17½ Inches.	
Height up to 25 Feet	Length unlimited Base, 13 Inches		

4. The above Table is to be used in the same Manner as the Table previously given for the Walls of Dwelling Houses, and is subject to the same Qualifications and Conditions respecting Walls not more than Twenty-five Feet distant from each other.

Explanation of Table

5 The Thickness of the Walls of Buildings of the Warehouse Class at the Top, and for Sixteen Feet below the Top, shall be Thirteen Inches, and the intermediate Parts of the Wall between the Base and such Sixteen Feet below the Top shall be built solid throughout the Space between straight Lines drawn on each Side of the Wall, and joining the Thickness at the Base to the Thickness at Sixteen Feet below the Top, as above determined, nevertheless in Walls not exceeding Thirty Feet in Height the Walls of the Topmost Story may be Eight Inches and a Half Thick.

Thickness at
intermediate
space.

6 If in any Story of a Building of the Warehouse Class the Thickness of the Wall, as determined by the Rules herein-before given, is less than One Fourteenth Part of the Height of such Story, the Thickness of the Wall shall be increased to One Fourteenth Part of the Height of the Story, but any such additional Thickness may be confined to Piers properly distributed, of which the collective Widths amount to One Fourth Part of the Length of the Wall.

Condition in
respect of Stor
exceeding a ce
tain Height

7 The Thickness of any Wall of a Building of the Warehouse Class, if Built of Materials other than such Bricks as aforesaid, shall be deemed to be sufficient if made of the Thickness required

Thickness of
Walls built o
Materials oth
than such Bri
as afore-said.

APPENDIX.

by the above Tables, or of such less Thickness as may be approved by the Metropolitan Board, with this Exception, that in the Case of Walls built of Stone in which the Beds of the Masonry are not laid horizontally no Diminution shall be allowed in the Thickness required by the foregoing Rules for such last-mentioned Walls.

MISCELLANEOUS.

Cross Walls.

1. The Thickness of a Cross Wall shall be Two Thirds of the Thickness herein-before required for an External or Party Wall of the same Dimensions, and belonging to the same Class of Buildings, but never less than Eight and a Half Inches, and no Wall subdividing any Building shall be deemed to be a Cross Wall unless it is carried up to Two Thirds of the Height of the External or Party Walls, and unless the Recesses and Openings therein do not exceed One Half of the vertical Surface of the Wall in each Story.

Extra Thickness of certain Stone Walls.

2 The Thickness of every Stone Wall in which the Beds of the Masonry are not laid horizontally shall be One Third greater than the Thickness prescribed in the Rules aforesaid.

3 Buildings to which the preceding Rules are inapplicable require the special Sanction of the Metropolitan Board of Works.

SECOND SCHEDULE.

FEES PAYABLE TO DISTRICT SURVEYORS.

PART I.

Fees for new Buildings.

For every Building not exceeding Four hundred Square Feet in Area, and not more than Two Stories in Height	...	...	...	...	..	...	s.	d.
							30	0
For every additional Story	...	...	...	...	...	...	5	0

For every additional Square of 100 Feet or Fraction of	s	d.
such Square	2	6

But no Fee shall exceed Ten Pounds.

And for every Building not exceeding Four Hundred Square Feet in Area, and of one Story only in Height, the Fees shall be	15	0
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Fees for Additions and Alterations.

For every Addition or Alteration made to any Building after the Roof thereof has been covered in, the Fee shall be Half of the Fee charged in the Case of a new Building.

For inspecting the Arches or Stone Floors over or under public Ways	10	0
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For inspecting the Formation of Openings in Party Walls	10	0
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PART II.

For inspecting dangerous Structures, by Direction of the Commissioners of Police or Sewers	20	0
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N.B—In this Schedule “Area” shall include the Area of any attached building.

METROPOLIS MANAGEMENT AND BUILDING ACTS
AMENDMENT ACT, 1878.

41 & 42 Vict , chapter 32.

An Act to amend the Metropolis Management Act, 1855, the Metropolitan Building Act, 1855, and the Acts amending the same respectively [22nd July, 1878]

WHEREAS the provisions of the several Acts now in force within the Metropolis are insufficient for duly regulating the erection and extension of houses and buildings in close proximity to certain

roads, passages, and ways, and it is expedient that for such purpose further and better provisions should be made.

And whereas with a view to protect the public frequenting theatres and music halls within the Metropolis from danger from fire, it is expedient that provisions such as are in this Act contained should be made for empowering the Metropolitan Board of Works (in this Act referred to as 'the Board') to cause alterations in existing theatres and music halls to be made in certain cases, and to make regulations with respect to the position and structure of new theatres and certain new music halls

And whereas it is expedient to make provisions with respect to the making, filling up, and preparation of the foundations and sites of houses and buildings to be erected within the Metropolis, and with respect to the quality of the substances to be used in the formation or construction of the sites, foundations, and walls of such houses and buildings with a view to the stability of the same, the prevention of fires, and for purposes of health

And whereas it is expedient to make further and better provisions with respect to the payment of expenses incurred by the Board in relation to dangerous structures

And whereas for the purposes aforesaid it is expedient to amend the Metropolis Management Act, 1855, the Metropolitan Building Act, 1855, and the Acts amending the same respectively.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows, (that is to say,)

Preliminary

Short title.

1 This Act may be cited for all purposes as the Metropolis Management and Building Acts Amendment Act, 1878

Limits of Act
18 & 19 Vict
c 120

2 This Act shall extend and apply to the Metropolis as defined by the Metropolis Management Act, 1855

Division of Act
into three parts

3 This Act shall consist of three parts.

PART I.

Interpretation

4 In this part of this Act—

Roadway'

The term 'roadway' in relation to any road, passage, or way shall mean the whole space open for traffic, whether carriage traffic and foot traffic or foot traffic only

'Centre of the
roadway.'

The term 'centre of the roadway' in relation to any road, passage, or way existing at the time of the passing of this Act or thereafter formed shall mean the centre of the roadway of

such road, passage, or way as existing immediately before the time when first after the passing of this Act or the formation of the same any house or building fronting towards or abutting upon such road, passage, or way was begun to be constructed or extended

The term 'the prescribed distance' shall mean twenty feet from the centre of the roadway where such roadway is used for the purpose of carriage traffic, and ten feet from the centre of the roadway where such roadway is used for the purposes of foot traffic only

'The prescribed distance'

5 The Metropolis Management Act, 1855, and the Acts amending the same, and this part of this Act shall be construed together as one Act. Provided always, that nothing in this Act shall be held to limit or restrict the powers now vested in the Commissioners of Sewers of the city of London, or in any body or person elsewhere within the Metropolis, by an Act passed in the session of Parliament held in the fifty-seventh year of the reign of King George the Third, intituled 'An Act for better paving, improving, and regulating the streets of the Metropolis and removing and preventing nuisances and obstructions therein'

Metropolis Management Acts and this part of Act to be construed as one Act

18 & 19 Vict. c 120
57 G III c xxix

6 From and after the passing of this Act no house or building begun to be constructed after the passing of this Act shall be constructed or begun to be constructed, and no house or building shall be extended or begun to be extended, in such manner that the external wall or front of any such house or building, or, if there be a forecourt or other space left in front of any such house or building, the external fence or boundary of such forecourt or other space, shall be at a distance less than the prescribed distance from the centre of the roadway of any road, passage, or way, whether a thoroughfare or not, being a highway, without the consent in writing of the Board. Provided always, that the Board may, in any case where they think it expedient, consent to the construction, formation, or extension of any house, building, forecourt, or space at a distance less than the prescribed distance from the centre of the roadway of any such road, passage, or way, and at such distance from the centre of such roadway, and subject to such conditions and terms (if any) as they may think proper to sanction.

As to erection of houses or buildings at less than prescribed distance from centre of roads, passages, or ways being highways.

In every case where any such house, building, forecourt, or space is constructed, formed, or extended, or is begun to be constructed, formed, or extended, in contravention of the provisions of this section, at a distance from the centre of the roadway of any such road, passage, or way as aforesaid less than the prescribed distance, or than such other distance as may have been sanctioned by the

Board or contrary to the conditions and terms (if any) subject to which such sanction was obtained, the Board may serve a notice upon the owner or occupier of the said house, building, forecourt, or space, or upon the builder or person engaged in constructing, forming, or extending the same, requiring him to comply with the provisions of this section, and to cause such house, building, forecourt, or space, or any part thereof, to be set back so that the external wall of such house or building, or the external fence or boundary of such forecourt or space, shall be at a distance not less than the prescribed distance from the centre of the roadway of such road, passage, or way as aforesaid, or at such distance and according to such conditions and terms (if any) as the Board may have sanctioned

Provided always, that the preceding provisions of this section shall not affect the construction or extension of any house or building within the limits of any area which may have been lawfully occupied by any house or building at any time within two years before the passing of this Act, or the construction or extension of any house or building lawfully in course of construction or extension at the time of the passing of this Act, and provided also, that the construction or extension of any house or building in or abutting upon any street existing, formed, or laid out for building at the time of the passing of this Act may be begun and completed in like manner in every respect as if the preceding provisions of this section had not been made

as to erection of
houses or build-
ings at less than
prescribed dis-
tance from
centre of roads,
passages, or ways
not being high-
ways.

7 Where after the passing of this Act any house or building begun to be constructed after the passing of this Act is constructed or is begun to be constructed, or any house or building is extended or begun to be extended, in such manner that the external wall or front of any such house or building, or, if there be a forecourt or other space left in the front of any such house or building, the external fence or boundary of such forecourt or space, is at a distance from the centre of the roadway of any road, passage, or way (not being a highway) less than the prescribed distance or less than such other distance as may have been sanctioned by the Board as hereinafter provided, or where, in relation to any such house, building, or forecourt, or space constructed, formed, or extended at such less distance than the prescribed distance with the sanction of the Board as aforesaid, the conditions or terms, if any, subject to which such sanction was obtained have not been complied with, or the time during which such sanction was limited to continue has expired, then and in every such case, where it is intended that such road, passage, or way shall become a highway, a written notice to that

effect shall be served upon the Board, and thereupon the Board may at any time within two months after the receipt of such notice serve a notice upon the owner or occupier of such house, building, forecourt, or space, or the builder or person engaged in constructing, forming, or extending the same, requiring him to cause the same, or any part thereof, to be set back so that the external wall or front of such house or building, or the external fence or boundary of such forecourt or space, shall be at a distance not less than the prescribed distance from the centre of the roadway of such road, passage, or way, or at such distance and according to such conditions and terms (if any) as the Board may have sanctioned, and unless and until such first-mentioned notice has been given to the Board and such last-mentioned notice (if any) has been complied with, such road, passage, or way shall not become a highway

The Board may consent to the construction, formation, or extension of any house, building, forecourt, or space at any lesser distance than the prescribed distance from the centre of the roadway of any such road, passage, or way (not being a highway) as aforesaid to be specified in such consent, or to the continuance of any house, building, forecourt, or space constructed, formed, or extended at such lesser distance, or to the continuance thereof for a limited time only, to be specified in such consent, in such cases and subject to such terms and conditions (if any) as they may think proper

Provided always, that the preceding provisions of this section shall not affect the construction or extension of any house or building within the limits of any area which may have been lawfully occupied by any house or building at any time within two years before the passing of this Act, or the construction or extension of any house or building lawfully in course of construction or extension at the time of the passing of this Act

8 In case any owner, occupier, builder, or person during twenty-eight days after the service of any notice under the preceding provisions of this part of this Act neglects or refuses to comply with the requirements of such notice, or after the expiration of such period fails to carry out or complete the works necessary for such compliance with all reasonable despatch, the Board may cause complaint thereof to be made before a justice of the peace, who shall thereupon issue a summons, requiring such owner, occupier, builder, or person to appear at a time and place to be stated in the summons to answer such complaint, and if at the time and place appointed in such summons the said complaint is proved to the satisfaction of the justice before whom the same is heard, such justice shall make an order in writing on such owner, occupier, builder, or person

Proceedings in case of default in compliance with requirements of notice.

directing him to comply with the requirements of such notice within such time as such justice may consider reasonable, and such justice shall also make an order for the payment of the costs incurred up to the time of hearing, and of hearing, and in case such owner occupier, builder, or person makes default in complying with the requirements of such notice within the time limited by such order, he shall be liable to a penalty of not less than forty shillings and not more than five pounds, and to a further penalty of not less than ten shillings and not more than forty shillings for each day during which such default continues after the first day after the expiration of the time limited by such order for compliance with the requirements of such notice. Provided always, that this section shall not apply to any noncompliance with the notice of the Board in the case of an intended highway where the same shall not be opened as a highway

Streets, roads,
&c formed for
foot traffic not to
be used without
consent of Board
for carriage
traffic unless
widened.

9 No street, road, passage, or way (being a highway) formed or laid out for foot traffic only after the passing of this Act shall, except with the consent of the Board, be used for the purposes of carriage traffic, unless the space open for foot traffic and carriage traffic be of the full width of forty feet where there are houses or buildings on each side thereof, or, where there are houses or buildings only on one side thereof, unless there be a distance of not less than twenty feet from the centre of the space open for foot traffic and carriage traffic and the external walls or fronts of such houses or buildings, or, if there be forecourts or other spaces left in front of such houses or buildings, the external fences or boundaries of such forecourts or other spaces, and in case any person alters any such street, road, passage, or way, so that it may be used for any traffic other than foot traffic, contrary to the provisions of this section, or takes up or removes any post, bar, rail, flagstone, or knowingly does any act, matter, or thing to facilitate the use of the same for traffic other than foot traffic, contrary to the provisions of this section, he shall for every such offence be liable to a penalty not exceeding fifty pounds

Streets, roads,
&c formed for
foot traffic before
passing of Act
not to be used
without consent
of justice for
carriage traffic
unless widened.

10 No street, road, passage, or way (being a highway) formed or laid out for foot traffic only before the passing of this Act shall be used for the purposes of carriage traffic for any longer period than seven consecutive days without the consent of a justice, unless the space open for foot traffic and carriage traffic be of the full width of forty feet where there are houses or buildings on each side thereof, or, where there are houses or buildings only on one side thereof, unless there be a distance of not less than twenty feet from the centre of the space open for foot traffic and carriage traffic and

the external walls or fronts of such houses or buildings, or, if there be forecourts or other spaces left in front of such houses or buildings, the external fences or boundaries of such forecourts or other spaces, and any justice may grant such consent as aforesaid, or may do so subject to such terms and conditions as he may think fit, provided that twenty-eight days previous notice of any such application to a justice shall be served upon the Board, and the Board may appear at the time and place fixed for hearing such application and be heard thereon. In case any person alters any such street, road, passage, or way, so that it may be used for any traffic other than foot traffic, contrary to the provisions of this section, or to any conditions imposed by any such justice as aforesaid, or takes up or removes any post, bar, rail, flagstone, or knowingly does any act, matter, or thing to facilitate the use of the same for traffic other than foot traffic, contrary to the provisions of this section, he shall for every such offence be liable to a penalty not exceeding twenty pounds.

11 Whenever it appears to the Board that any house or other place of public resort within the Metropolis which was at the time of the passing of this Act authorised to be kept open for the public performance of stage plays, and which is kept open for such purpose, under the authority of letters patent from Her Majesty, her heirs and successors or predecessors, or of a license granted by the Lord Chamberlain of Her Majesty's Household for the time being, or by justices of the peace, or that any house, room, or other place of public resort within the Metropolis, containing a superficial area for the accommodation of the public of not less than five hundred square feet, which was at the time of the passing of this Act authorised to be kept open, and which is kept open, for dancing, music, or other public entertainment of the like kind, under the authority of a license granted by any court of quarter sessions, is so defective in its structure that special danger from fire may result to the public frequenting the same, then and in every such case the Board may, with the consent of the Lord Chamberlain in the case of theatres under his jurisdiction, and of Her Majesty's Principal Secretary of State in all other cases, if in the opinion of the Board such structural defects can be remedied at a moderate expenditure, by notice in writing require the owner of such house, room, or other place kept open for any of the purposes aforesaid, under such authority as aforesaid, to make such alterations therein or thereto as may be necessary to remedy such defects, within a reasonable time to be specified in such notice, and in case such owner fails to comply with the requirements of such notice within such reasonable

Power to Board
in certain cases
to require
proprietors of
theatres and cer-
tain music halls
in use at the
time of the pass-
ing of this Act
to remedy struc-
tural defects

time as aforesaid, he shall be liable to a penalty not exceeding fifty pounds for such default, and to a further penalty of five pounds for every day after the first day after the expiration of such reasonable time as aforesaid during which such default continues. Provided always, that any such owner may, within fourteen days after the receipt of any such notice as aforesaid, serve notice of appeal against the same upon the Board, and thereupon such appeal shall be referred to an arbitrator to be appointed by Her Majesty's First Commissioner of Works at the request of either party, who shall hear and determine the same, and may, on such evidence as he may think satisfactory, either confirm the notice served by the Board, or may confirm the same with such modifications as he may think proper, or refuse to confirm the same, and the decision of such arbitrator with respect to the requirements contained in any such notice, and the reasonableness of the same, and the persons by whom and the proportions in which the costs of such arbitration are to be paid, shall be final and conclusive and binding upon all parties.

In case of an appeal against any such notice, compliance with the requirements of the same may be postponed until after the day upon which such appeal shall be so decided as aforesaid, and the same, if confirmed in whole or in part, shall only take effect as and from such day.

Power to Board to make regulations with respect to new theatres and certain new music halls for protection from fire.

12 The Board may from time to time make, alter, vary, and amend such regulations as they may think expedient with respect to the requirements for the protection from fire of houses or other places of public resort within the Metropolis to be kept open for the public performance of stage plays, and of houses, rooms, or other places of public resort within the Metropolis containing a superficial area for the accommodation of the public of not less than five hundred square feet, to be kept open for public dancing, music, or other public entertainment of the like kind, under the authority of letters patent from Her Majesty, her heirs or successors, or of licenses by the Lord Chamberlain of Her Majesty's Household, or by any justices of the peace, or by any court of quarter sessions, which may be granted for the first time after the passing of this Act, and may by such regulations prescribe the requirements as to position and structure of such houses, rooms, or places of public resort which may, in the opinion of the Board, be necessary for the protection of all persons who may frequent the same against dangers from fires which may arise therein or in the neighbourhood thereof, provided that the Board may from time to time in any special case dispense with or modify such regulations, or may annex thereto conditions if they think it necessary or expedient so to do.

The Board shall, after the making, altering, varying, or amending of any such regulations, cause the same to be printed, with the date thereof, and a printed copy thereof shall be kept at the office of the Board, and all persons may at all reasonable times inspect such copy without payment, and the Board shall cause to be delivered a printed copy authenticated by their seal, of all regulations for the time being in force to every person applying for the same, on payment by such person of any sum not exceeding five shillings for every such copy

A printed copy of such regulations, dated and authenticated by the seal of the Board, shall be conclusive evidence of the existence and of the due making of the same in all proceedings under the same, without adducing proof of such seal or of the fact of such making

From and after the making of any such regulations it shall not be lawful for any person to have or keep open any such house, room, or other place of public resort for any of the purposes aforesaid, unless and until the Board grant to such person a certificate in writing under their seal, to the effect that such house, room, or other place was on its completion in accordance with the regulations made by the Board in pursuance of the provisions of this Act for the time being in force, and in so far as the same are applicable to such house or other place, and to the conditions (if any) annexed thereto by the Board

In case any such house, room, or place of public resort is opened or kept open by any person for any of the purposes aforesaid, contrary to the provisions of this enactment, such person shall be liable to a penalty not exceeding fifty pounds for every day on which such house or place of public resort is so kept open as aforesaid

13 A person interested in any premises about to be constructed, or in course of construction, which are designed to be licensed and used within the Metropolis for the public performance of stage plays, or for public dancing, music, or other public entertainment of the like kind, may apply to the licensing authority for the grant of a provisional license in respect of such premises. The grant of such provisional license shall, in respect of the discretion of the licensing authority and procedure, be subject to the same conditions as those applicable to the grant of a like license which is not provisional. A provisional license so granted shall not be of any force until it has been confirmed by the licensing authority, but the licensing authority shall confirm the same on the production by the applicant of a certificate by the Board that the construction of the

Provisional
license for
new premises.

premises has been completed in accordance with the regulations and conditions made by the Board as herein-before provided, and on being satisfied that no objection can be made to the character of the holder of such provisional license.

PART II.

Interpretation.

'Foundations.'

14 In this part of this Act—

The term 'foundations' shall mean the space immediately beneath the footings of a wall

'Site.'

The term 'site' in relation to a house, building, or other erection shall mean the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls

18 & 19 Vict.
c 122, &c, and
this part of
this Act to be
construed as
one Act

15 The Metropolitan Building Act, 1855, and the Acts amending the same, and this part of this Act shall be construed together as one Act

Power to Board
to make bye-
laws with respect
to sites and
foundations.

16 The Board may from time to time make, alter, vary, amend, and repeal such byelaws as they may think expedient with respect to the following matters, (that is to say,)

(1) The foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health

(2) The description and quality of the substances of which walls are authorised to be constructed by section twelve of the Metropolitan Building Act, 1855, for securing stability, the prevention of fires, and for purposes of health.

(3) The duties of district surveyors in relation to such foundations and sites and substances, and for the guidance and control of such district surveyors in the exercise and discharge of such duties

(4) The regulation of the amounts of the fees to be paid to such district surveyors in respect of any duties imposed upon them by any such byelaws or by this Act

18 & 19 Vict.
c 122, s. 12.

The Board may further provide by any byelaw that in any case in which the Board think it expedient they may dispense with the observance of any byelaw made under the authority of this part of this Act, subject to such terms and conditions, if any, as they

may think proper, and such terms and conditions may be enforced in like manner in every respect as if the same had been enacted by such byelaw

The Board may, subject as herein-after mentioned, further provide for the due observance of such byelaws by enacting therein such provisions as they think fit as to the deposit of plans and sections of public buildings, and buildings to which section fifty-six of the Metropolitan Building Act, 1855, applies, which shall be constructed after the passing of this Act, and as to inspection by the district surveyor or other officer of the Board of houses, buildings, and other erections to be constructed after the passing of this Act, and of the plans and sections relating thereto, and as to the power of the Board to cause the removal, alteration, or pulling down of any house, building, or other erection or work done or begun in contravention of any such byelaw, and by imposing such reasonable penalties as they think fit, not exceeding five pounds, for each breach of any such byelaw, and in case of a continuing offence a further penalty not exceeding forty shillings for each day after notice of such offence from the Board or district surveyor

18 & 19 Vict.
c 122, s 56.

Any byelaw made in pursuance of this section, and any alteration, variation, and amendment made therein, and any repeal of a byelaw, shall not be of any validity until it has been confirmed by one of Her Majesty's Principal Secretaries of State

A byelaw made under this section shall not, nor shall any alteration, variation, or amendment therein or repeal thereof, be confirmed by one of Her Majesty's Principal Secretaries of State until the expiration of two months after a copy of the byelaw, together with notice of the intention to apply for confirmation of the same, has been published by the Board, once at least in each of two consecutive weeks, in two or more newspapers circulating in the Metropolis, and copies of such byelaw and notice have been delivered at the office of the Royal Institute of British Architects and of the Institution of Surveyors, and to such other societies and persons as such Principal Secretary of State may direct, and any person affected by any such proposed byelaw, or alteration, variation, or amendment in or repeal of any byelaw, may forward notice of his objection to such Secretary of State, who shall take the same into consideration.

All the provisions contained in sections two hundred and two and two hundred and three of the Metropolis Management Act, 1855, as to the making, publication, and evidence of byelaws made by the Board under the authority of the said Act, and as to

18 & 19 Vict.
c 120,
ss 202, 203.

penalties for breach of the same, and the remission of such penalties, shall extend and apply to the making, publication, and evidence of byelaws made by the Board under the authority of this Act, and to penalties for breach of any such byelaws, and to the remission of such penalties

Provisions as to buildings, &c not erected on foundations or areas conformable with byelaws, &c.

17 In case any house, building, or other erection begun to be constructed after the passing of this Act is constructed or begun to be constructed upon any foundations or site or with any substances which have not been made, filled up, and prepared, or which are not in description and quality in accordance with the provisions of the byelaws relating thereto made under the authority of this Act, or in accordance with the terms and conditions subject to which the Board may have dispensed with the observance of any such provisions, the district surveyor may forthwith, by notice to be served on the occupier of such house, building, or other erection, or on the builder, owner, or other person engaged in constructing any such house, building, or other erection as aforesaid, require him to alter, pull down, or remove such house, building, or other erection, or any part thereof, as he may think proper, and in case any such occupier, builder, owner, or other person, during twenty-eight days after the service of such notice, fails to comply with the requirements of such notice, he shall be liable to a penalty of not less than ten shillings and not more than forty shillings for every day from the time of the service of such notice as aforesaid until such house, building, or other erection, or such part thereof, is altered, pulled down, or removed in accordance with the terms of such notice, and every such penalty shall be in addition to any other penalty for breach of any byelaw

Provided always, that, notwithstanding the imposition and recovery of any penalty, the Board at any time after default in compliance with the requirements of such notice, if they think proper, may cause complaint thereof to be made before a justice of the peace, who shall thereupon issue a summons requiring such occupier, builder, owner, or other person to appear at a time and place to be stated in the summons to answer such complaint, and if at the time and place appointed in such summons the said complaint is proved to the satisfaction of the justice before whom the same is heard, such justice may make an order in writing authorising the Board to enter and alter, pull down, or remove such house, building, or other erection, or any part thereof, and do whatever may be necessary for such purpose, and also to remove the materials of which the same was composed to a convenient place, and (unless the expenses of the Board be paid to them within fourteen

days) subsequently sell the same as they think proper, and all expenses incurred in respect of such entering and altering, pulling down, or removing any such house, building, or other erection, and in disposing of the said materials, may be deducted by the Board out of the proceeds of such sale, and the balance, if any, shall be paid by the Board to the person entitled thereto, and in case such materials are not sold by the Board, or in case the proceeds of the sale of the same are insufficient to defray the expenses incurred by the Board as aforesaid, the Board may recover such expenses or such insufficiency from such occupier, builder, owner, or other person, together with all costs and expenses in respect thereof, in like manner as if the same were a penalty imposed by this Act.

18 Any person affected by any notice under the preceding provisions of this part of this Act may, within seven days after the service of the same, appeal to the Board **Power to appeal.**

All such appeals shall stand referred to the Committee of Appeal appointed by the Board under and in pursuance of section two hundred and twelve of the Metropolis Management Act, 1855, for hearing appeals, who may hear and determine the same, and may order the district surveyor, or any other surveyor, to inspect any foundations, site, house, building, or other erection, and may, on such evidence as they think satisfactory, either confirm the notice served by the district surveyor, or may confirm the same with such modifications as they think proper, or refuse to confirm the same **18 & 19 Vict. c 120, s 212.**

In case of an appeal against any such notice, compliance with the requirements of the same may be postponed until after the day upon which such appeal shall be so decided as aforesaid, and the same if confirmed in whole or in part, shall only take effect as and from such day.

19 Where under the provisions of the Metropolitan Building Act, 1855, and the Acts amending the same, with respect to dangerous structures, any structure is sold for payment of the expenses incurred in respect thereof by the Board in manner prescribed by section seventy-four of the said Act, the person to whom the same is sold (herein-after referred to as 'the purchaser'), his agents and servants, may enter upon the land whereon such structure is standing for the purpose of taking down the same and of removing the materials of which the same is constructed, and any person who refuses to admit the purchaser, his agents or servants, upon such land, or impedes him in removing such materials, shall be liable on conviction to a penalty not exceeding ten pounds, and to a further penalty of five pounds for every day after the first day during which such refusal continues. **Amendment of s 74 of 18 & 19 Vict c 122, with respect to sale of dangerous structures.**

Where the proceeds of the sale of any such structure under the said seventy-fourth section are insufficient to repay the Board the amount of the expenses incurred by them in respect of such structure, no part of the land whereon such structure stands or stood shall be built upon until after the balance due to the Board in respect of such structure shall have been paid to the Board

Part II of Act
not to apply to
city of London.

20 Provided always, that the provisions of Part II of this Act shall not extend or apply to the city of London.

PART III.

Power for architect and persons authorised by Board, and district surveyor, to enter and inspect theatres, music halls, buildings, and works

21 The architect of the Board, and any other person authorised by the Board in writing under their seal, may, at all reasonable times after completion or during construction, enter and inspect any house, room, or other place kept open or intended to be kept open for the public performance of stage plays, or for public dancing, music, or other public entertainment of the like kind affected by any of the provisions of this Act, or of any regulations made in pursuance thereof, and the district surveyor of any district may at all reasonable times during the progress and the three months next after the completion of any house, building, erection, or work in such district affected by and not exempted from any of the provisions of this Act, or by any byelaw made in pursuance of this Act, or by any terms or conditions upon which the observance of any such provisions or any of such byelaws may have been dispensed with, enter and inspect such house, building, erection, or work, and if any person refuses to admit such architect, person, or surveyor, or to afford him all reasonable assistance in such inspection, in every such case the person so refusing shall incur for each offence a penalty not exceeding twenty pounds

Power to owners, &c to enter houses, &c, to comply with notices or order.

22 For the purpose of complying with the requirements of any notice or order served or made under the provisions of this Act, on any owner, builder, or person in respect of any house, building, or other erection, room, or place, such owner, builder, or person, his servants, workmen, and agents, may, after giving seven days' notice in writing to the occupier of such house, building, or other erection, room, or place, and on production of such notice or order, enter such house, building, or other erection, room, or place, and do all such works, matters, and things therein or thereto, or in connection therewith, as may be necessary, and if any person refuses to admit such owner, builder, or person, or his servants or workmen or agents, or to afford them all reasonable assistance,

such person shall incur for each offence a penalty not exceeding twenty pounds.

23 Every penalty imposed by Part I and Part III of this Act may be recovered by summary proceedings before any justice in like manner and subject to the like right of appeal as if the same were a penalty recoverable by summary proceedings under the Metropolis Management Act, 1855, and the Acts amending the same, and every penalty imposed by Part II of this Act, or by any bye-law made in pursuance thereof, may be recovered by summary proceedings before any justice in like manner and subject to the like right of appeal as if the same were a penalty recoverable by summary proceedings under the Metropolitan Building Act, 1855, and the Acts amending the same. Provided always, that in any proceedings against any person for more than one penalty in respect of one or more breach or breaches of any provision of this Act or of any byelaw made in pursuance of this Act, it shall be lawful to include in one summons all such penalties, and the charge for such summons shall not exceed two shillings.

Recovery of penalties.

18 & 19 Vict.
c. 120

18 & 19 Vict.
c. 122

24 Her Majesty's royal palaces, and all buildings, works, and ground excepted from the operation of the Metropolis Management Act, 1855, and the Acts amending the same, or of any of the said Acts, shall be excepted from the operation of the provisions of this Act which are to be construed with such Acts, and all exemptions from the provisions of any of the said Acts shall extend to such of the provisions of this Act as are to be construed as aforesaid with such Acts.

Exceptions from Metropolis Management Acts extended to this Act.
18 & 19 Vict.
c. 120

25 Her Majesty's royal palaces, and all buildings, works, and ground excepted from the operation of the Metropolitan Building Act, 1855, and the Acts amending the same, or of any of the said Acts, shall be excepted from the operation of the provisions of this Act which are to be construed with such Acts, and all exemptions from the provisions of any of the said Acts shall extend to such of the provisions of this Act as are to be construed as aforesaid with such Acts.

Exceptions from Metropolitan Building Acts extended to this Act.
18 & 19 Vict.
c. 122

26 Nothing in this Act, or in any bye-law of the Board thereunder, shall apply to the Inner Temple, the Middle Temple, Lincoln's Inn, Gray's Inn, Staple Inn, Furnival's Inn, or the close of the collegiate church of Saint Peter, Westminster.

Act not to apply to the Inner and Middle Temple, &c

27 Nothing contained in this Act, or in any byelaw thereunder made, shall apply to or shall authorise or empower the Board, or any vestry, district board, or district surveyor, to take, use, or in any manner interfere with any land, soil, tenements, or hereditaments, or any rights of whatsoever nature, belonging to or enjoyed or

Saving rights of the Crown and the Duchy of Lancaster

38 & 39 Vict.
c. 65.

exercisable by the Queen's most Excellent Majesty in right of her Crown, or in right of her Duchy of Lancaster, without the consent in writing of the Commissioners for the time being of Her Majesty's Woods, Forests, and Land Revenues, or one of them, on behalf of Her Majesty, in right of her Crown, first had and obtained for that purpose (which consent such Commissioners are hereby respectively authorised to give), or without the consent in like manner of the Chancellor of the said Duchy, on behalf of Her Majesty, in right of her said Duchy, neither shall anything contained in this Act, or in any byelaw thereunder made, extend to divest, take away, prejudice, diminish, or alter any estate, right, privilege, power, or authority vested in or enjoyed or exercisable by the Queen's Majesty, her heirs or successors, in right of her Crown, or in right of her said Duchy, and nothing contained in Part I of this Act shall apply to the extension of Savoy Street or the bridge which the Chancellor and Council of the said Duchy are by the Metropolitan Board of Works (Various Powers) Act, 1875, empowered to make and construct, or to any house or building within the precinct of the Savoy, or upon the land mentioned in section six of the last-mentioned Act, constructed or extended after the passing of this Act, in or abutting upon any road, passage, or way existing, formed, or laid out at the time of the passing of this Act.

METROPOLITAN BOARD OF WORKS.

Bye-laws made by the Board under the Provisions of the Metropolis Management and Building Acts Amendment Act, 1878, sect. 16.

1. FOUNDATIONS AND SITES OF BUILDINGS.

No House, Building, or other Erection, shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any faecal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed, by excavation or otherwise, from such site. Any holes caused by such excavation must, if not used for a basement or cellar, be filled in with hard brick or dry rubbish.

The site of every House or Building shall be covered with a layer of good Concrete, at least six inches thick, and smoothed on the upper surface, unless the site thereof be gravel, sand, or natural virgin soil.

The foundations of the walls of every House or Building shall be formed of a bed of good Concrete, not less than nine inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls. If the site be upon a natural bed of gravel, Concrete will not be required.

The Concrete must be composed of clean Gravel, broken hard Brick, properly burnt ballast, or other hard material to be approved by the District Surveyor, well mixed with fresh burnt Lime or Cement in the proportions of one of Lime to six, and one of Cement to eight of the other material

The foregoing Bye-law shall not apply to any Building or other Erection to be used as a Stable or Shed, provided that such Erection shall not be used for any public entertainment or assembly of persons, or as a dwelling or sleeping place.

2. DESCRIPTION AND QUALITY OF THE SUBSTANCES OF WALLS.

The external walls of every House, Building or other Erection, shall, except in the case of Concrete Buildings, be constructed of good, hard, sound, well-burnt Bricks, or of Stone, and shall be put together with good Mortar or good Cement

Similar Bricks shall be used in the portions of party and cross walls below the surface or level of the ground, and above the roof, including the Chimney Stacks. Cutters or malms may be used in arches over recesses and openings in, or facings of, external walls

Stone used for the construction of Walls must be free from vents, cracks, and sand-holes, and be laid on its natural bed.

The Mortar to be used must be composed of fresh burnt lime and clean sharp sand or grit, without earthy matter, in the proportions of one of lime to three of sand or grit

The Cement to be used must be Portland Cement, or other Cement of equal quality mixed with clean sharp sand or grit, in the proportions of one of cement to four of sand or grit

Burnt ballast or broken brick may be substituted for sand or grit, provided such material be properly mixed with lime in a mortar mill

Every wall of a House or Building shall have a damp course throughout its whole thickness, of Asphalte, or other material impervious to moisture. The damp course in external walls shall be at a height of one foot above the level of the ground directly abutting

upon the external wall, and in the party or internal walls at a level of not less than six inches below that of the lowest floor.

The top of every party-wall and parapet-wall shall be finished with one course of hard, well-burnt bricks set on edge, in cement, or by a coping of any other waterproof and fire-resisting material, properly secured.

3. DUTIES OF DISTRICT SURVEYORS.

It shall be the duty of each District Surveyor, on receiving notice of the commencement of any House, Building, or other Erection, or of any alteration or addition, or on his becoming aware that any House, Building, or other Erection, or any alteration or addition, is being proceeded with, to see that the provisions of the foregoing Bye-laws are duly observed (except in cases where the Board may have dispensed with the observance thereof), and to see that the terms and conditions upon which any dispensation may have been granted are complied with.

4. FEES TO BE PAID TO DISTRICT SURVEYORS

The District Surveyor shall, in respect of the erection of any House or other Building, be entitled to receive the sum of Five Shillings, the same to be taken and deemed to be a fee due to such District Surveyor in respect of the duties imposed upon him by the Metropolis Management and Building Acts Amendment Act, 1878, and these Bye-laws, such fee to be payable in the manner and at the time prescribed by Section 51 of the Metropolitan Building Act, 1855. The District Surveyor shall also, in every case where, in respect of any breach of these Bye-laws or of the above Act of Parliament, an application shall be made by him to a Justice, and an order made thereon, be in like manner entitled to receive the sum of Ten shillings, in addition to the before-mentioned fee of Five shillings.

5. DEPOSIT OF PLANS AND SECTIONS

On Notice being given to a District Surveyor of the intended erection, re-erection, alteration of, or addition to a Public Building, or a Building to which Section 56 of the Metropolitan Building Act, 1855, applies, it shall be the duty of the person giving such Notice to deposit Plans and Sections of such erection, re-erection, alteration, or addition, with the District Surveyor. Such Plans and Sections shall be of sufficient detail to show the construction.

On Notice being given to the District Surveyor of the intended erection or alteration of or addition to any House, Building, or other Erection, other than a Public Building, the District Surveyor may, if he think fit so to do, by notice in writing, require the person

giving such notice to produce a Plan or Plans and Sections of any such House, Building, or other Erection, or of the intended alterations or additions thereto, for his inspection.

6. PENALTIES.

In case of any breach of any of the provisions contained in these Bye-laws, the offender shall be liable for each offence to a penalty not exceeding Three pounds, and, in each case of a continuing offence, to a further penalty not exceeding Thirty shillings for each day after Notice thereof from the Board or the District Surveyor

In any case, if the Board think it expedient, they may dispense with the observance of any of the foregoing Bye-laws, or any part thereof, upon such terms and conditions as they may think proper, and in case of the non-observance of any terms and conditions upon which the Board may have dispensed with the observance of any of the foregoing Bye-laws, then such proceedings may be taken and such liabilities shall be incurred as if no such dispensation had been granted.

Sealed by Order,

- J E WAKEFIELD,

Clerk of the Board.

SPRING GARDENS,

3rd October, 1879

L S.

I confirm the foregoing Bye-laws,

RD. ASSHETON CROSS,

WHITEHALL,

6th October, 1879.

*One of Her Majesty's Principal
Secretaries of State*

FORMS.

It is hoped that the following forms of agreement will be found sufficient for cases of ordinary occurrence. They are not intended to meet the requirements of extraordinary contracts or undertakings of unusual magnitude.

For provisions as to stamps on agreements see *ante*, page 115 (note).

FORM OF AN AGREEMENT BETWEEN A FREE- HOLDER AND A BUILDING TENANT.

ARTICLES OF AGREEMENT made and entered into this
 day of A D. between A B of
 in the county of Esquire
 (hereinafter called the landlord) of the one part and C D of
 in the county of builder (herein-
 after called the tenant) of the other part.

Whereby it is mutually agreed as follows :—

1. The tenant may for the purpose of building and erecting the houses and works in the manner and to the extent hereinafter mentioned enter upon the plots or pieces of land fronting on the south side of the road in the parish of in the county of which plots of land are delineated on the plan hereto annexed and thereon coloured red and numbered 1 to 12 as appears on the said plan.

2 Within two years from the day of the date hereof the tenant will at his own expense erect and build finish and make fit for habitation on the said pieces or plots of land twelve houses with suitable offices and outbuildings and with proper sewers and drains therefrom and all footpaths curbs and pavings respectively and shall and will build nine of such houses on the plots numbered 1 to 9 inclusive on the said plan on or before the day of A.D. and three of such houses on the remaining plots on or before the day of A.D. all the said houses to be substantial dwelling-

8. The landlord will from time to time when and as often as any of the houses intended to be built upon the pieces or plots of land numbered 1 to 9 inclusively on the said plan shall have been erected built and covered in as aforesaid and the drains and sewers therefrom shall have been formed to the satisfaction and according to the agreement hereinbefore contained grant a lease of each of such houses and of the sites thereof and of the intended yards gardens forecourts and outbuildings thereto and every such lease shall be for a term which shall expire (unless sooner determined by surrender re-entry forfeiture or otherwise) on the day of A D. (99 years) and shall be as nearly as circumstances will admit and with such alterations and additions as circumstances shall require in the form and contain the exceptions reservations covenants conditions and provisions set forth and specified in a draft lease approved of and signed by the tenant on the day of the date of this agreement.

9. The annual rent to be reserved by such leases shall be not less than the sum of £ for each house comprised thereon.

10. The tenant will when and so soon as each of the houses intended to be built on the said pieces or plots of land numbered 1 to 9 inclusively on the said plan shall be erected built and covered in and the drains and sewers therefrom shall have been formed as aforesaid apply for and accept a lease to him or his approved of nominee of each and every of such houses with the appurtenances as aforesaid without requiring the landlord to show or prove his title to grant the same and will duly execute a counterpart or counterparts of such lease or leases and all such leases and counterparts as aforesaid shall be drawn and engrossed by the solicitor of the landlord and the tenant will pay the costs of so drawing and engrossing the same and of obtaining the execution thereof by all parties and all other expenses of or relating to every such lease but such costs shall not exceed the sum of guineas for a lease of one house but if such lease shall comprise more than one house the costs thereof shall not exceed a sum charged as follows videlicet guineas for the first house and guineas for any additional house together with such sum as shall be paid in every case for parchment and stamp duty and the tenant shall pay the costs charges and expenses of preparing and stamping and obtaining the execution of these presents in duplicate and likewise all fees and other moneys which may become payable to any district or public surveyor in respect of the premises and a fee of guineas in respect of each house to the said surveyor on his giving a certificate previous to a lease being granted such fee to include the making and preparing a

ground plan of the property demised and drawing the same on every lease and counterpart

11 Until such lease or leases as aforesaid shall be granted the tenant shall occupy the said pieces or plots of land subject to the agreements herein contained and also so far as applicable to the covenants and conditions hereby provided to be contained in such lease or leases in the same manner as if such lease or leases were actually granted and the tenant had executed a counterpart or counterparts thereof

12. When and so soon as the several houses to be erected upon the said plots of land numbered 1 to 9 inclusive on the said plan shall have been completely finished in all things to the satisfaction of the said surveyor and the leases thereof granted in accordance with the provisions hereinbefore contained and in addition thereto when and so soon as the houses to be erected upon the plots of land numbered 10 11 and 12 on the said plan shall have been completely finished similar to the houses whereof leases shall have been granted as aforesaid and to the satisfaction of the said surveyor the landlord will upon the request in writing of the tenant convey each of the said plots of land numbered 10 11 and 12 and the houses and buildings then erected thereon to the tenant in fee simple for a nominal consideration and subject to such restrictive covenants on the part of the tenant for preserving the uniformity of the building and other matters as the landlord shall think fit such conveyance to be prepared by the solicitor of the landlord and the tenant to pay the expense of each such conveyance Provided always that if the said nine houses shall not be completed before the day of A.D. and the said three houses shall not be completed before the day of A.D. as aforesaid to the satisfaction of the said surveyor in all respects as aforesaid the landlord shall be freed and discharged from all obligation to convey the said three houses as aforesaid and in this respect time shall be considered to be of the essence of the contract Provided also that in case such three plots are conveyed as aforesaid the landlord's title shall be assumed and no inquiry shall be made in respect thereof.

13. If any part of the yearly rent which under or by virtue of these presents shall for the time being be payable by the tenant until leases shall have been granted in pursuance thereof of the plots of land hereby agreed to be demised shall be in arrear for twenty-eight days whether legally demanded or not or if the tenant shall become or be declared bankrupt or shall take the benefit of any Act for the relief of insolvent debtors or shall resign or make over his effects for the benefit of his creditors or any class

of them or compound or make any proposal to compound with such creditors or if there shall be a breach of any of the tenant's agreements hereinbefore contained then and in any or either of such cases the landlord may re-enter upon the whole of the said plots of land numbered 1 to 9 inclusive then remaining to be demised and also upon the said plots of land numbered 10 11 and 12 on the said plan and hold and enjoy the same and all buildings then standing thereon and all materials and effects then being thereon and as a stipulated compensation and not as in the nature of a penalty or forfeiture against which relief might be sought in equity and thenceforth this agreement and every clause matter and thing herein contained on the part of the landlord shall cease and be void but the tenant shall not be discharged from any damages to which he may be or might have been otherwise liable for or on account of the breach of all or any of the agreements herein contained on his part which ought to have been or which remain to be performed.

14. The expression 'the landlord' used in these presents shall extend to and include the heirs and assigns of the said A B and the expression 'the tenant' shall extend to and include the executors administrators and assigns of the said C D

Witness our hands

A B

C D.

Here follow the specifications hereinbefore referred to.

**FORM OF BUILDING CONTRACT NOT UNDER
SEAL BETWEEN THE BUILDER AND THE EM-
PLOYER.**

MEMORANDUM OF AGREEMENT made and entered into the
day of A.D. between A B
of in the county of (hereinafter called
the builder) of the first part and C D of in the county
of (hereinafter called the employer) of the other part.

1. The said builder doth hereby promise and agree to and with the said employer that he the said builder will or shall for the remuneration hereinafter mentioned within the space of calendar months from the date of this agreement erect build and completely cover in and finish upon the premises [describe the situation with accuracy] a dwelling-house and buildings according to the plans specifications and elevations set forth in the schedule hereunto annexed.

2. And also do perform and execute or cause and procure to be

done performed and executed all and singular the works above mentioned in the schedule hereunto annexed according to the plans specifications and elevations therein mentioned and contained the same to be done within the time aforesaid and in a good workmanlike and substantial manner to the satisfaction of E F [architect or surveyor] of _____ in the county of _____ or any other architect or surveyor whom the said builder and employer by some writing under their hands shall appoint to be testified by a certificate in writing under the hand of the said E F or such other architect or surveyor as may be appointed as aforesaid.

3 And also will or shall find and provide such good proper and suitable materials of all kinds whatever as shall be proper and sufficient for erecting the said dwelling-house and buildings and completely finishing the said works.

4. And it is further agreed by and between the said parties that if the said builder should in any manner neglect or be guilty of any delay whatever in building and completely finishing the said dwelling-house and works as aforesaid and the said employer should give or leave notice in writing of the said neglect or delay at the place of abode of him the said builder and the said builder should not proceed to complete the said buildings or works within the space of seven days after such notice shall have been given or left as aforesaid then and in any such case it shall be lawful for the said employer to purchase proper and sufficient materials and also to employ a sufficient number of workmen to finish and complete the said dwelling-house buildings and works And also that the said employer may deduct and retain to himself the cost of such materials and all such sum and sums of money as he shall pay to such workmen for the completion of such dwelling-house buildings and works out of the money which shall be due to the said builder under this agreement And also that the said builder will not do or in any manner cause to be done any act matter or thing whatever to prevent hinder or molest the said employer or any person or persons employed by him from completing and finishing the said dwelling-house buildings and works in manner aforesaid or in using the materials which shall be on the said premises and provided by either of the said parties for the doing thereof.

5. And the said employer doth hereby promise and agree to and with the said builder that he the said employer will and shall well and truly pay or cause to be paid unto the said builder the sum of £ _____ within _____ days [weeks or months] next after the said dwelling-house buildings and works shall be completely built finished and done to the satisfaction of the said E F or such other

architect or surveyor as may be appointed as aforesaid to be testified in writing under his hand.

Or

[After the sum of] £ of lawful English money in manner following that is to say the sum of seventy-five pounds per cent. on the amount of the materials used in the said buildings and works as they shall proceed such amount to be ascertained by the surveyor for the time being whose certificate in writing under his hand shall be conclusive between the parties and the remainder of the said sum of £ within days [weeks or months etc etc as above] Provided always and it is hereby agreed by and between the said builder and the said employer that should the said builder make default and fail to completely finish the said dwelling-house buildings and works by the day of A.D. the said employer shall and may deduct as and for ascertained damages the sum of £ per diem for each day during which the said dwelling-house and buildings shall not be completely finished from any moneys which may be due to the said builder from the said employer in respect of the said dwelling-house and buildings.

6. And it is hereby agreed by and between the said parties hereto that in case the said employer should direct any more work to be done in or about the said dwelling-house and buildings than is contained in the schedule hereunto annexed then and in such case the said employer shall pay or cause to be paid unto the said builder so much money as the extra work and materials used therein shall amount unto by fair measurement to be made by the said E F or the architect or surveyor for the time being.

Or

And it is hereby agreed by and between the said parties hereto that no claim shall be made or payment demanded by the said builder for any extra or additional work which may be done in or about the said dwelling-house or buildings from the said employer unless such work and the materials used therein shall have been done and supplied in pursuance of the written direction of the said E F or the architect or surveyor for the time being And in case such extra work and materials shall have been done and supplied in pursuance of such written direction as aforesaid then and in such case the said employer shall pay or cause to be paid to the said builder so much money as the said extra work and the materials used therein shall amount to upon fair valuation to be made by the said E F or the architect or surveyor for the time being and the finding of the said architect or surveyor as to the

amount and value of such extra work and materials shall be final and conclusive between the parties.

7 And it is hereby agreed by and between the said parties that if any dispute or difference should happen or be made between them touching or concerning the said dwelling-house buildings and works hereby agreed to be built and done as aforesaid or touching or concerning any other matter or thing whatever relating to the work hereby contracted to be done or such additional or extra work as aforesaid then such dispute and difference shall be left to the determination and award of three indifferent persons one to be named by the said builder and another by the said employer and the third to be chosen by the said two persons so to be named by the parties hereto within ten days after notice of such dispute or difference.

8 And each of them the said parties doth hereby agree with the other to obey perform stand by and keep the award and determination of the said three parties so to be chosen or any two of them touching the said matters and things so to be referred to them as aforesaid so as the same determination be made in writing under the hands and seals of such arbitrators or any two of them within one calendar month next after such reference.

9. And it is hereby agreed by and between the said parties that any submission to arbitration made in pursuance of the above agreement shall at the option and expense of either of the said parties requiring the same be made a rule of any of her Majesty's Courts of Law at Westminster and that the costs of the said reference and arbitration shall be at the discretion of the said arbitrators or any two of them and shall be paid and satisfied as directed by their award.

As witness our hands

A B

C D.

CONDITIONS OF BUILDER'S CONTRACT.

(Prepared by the London Builders' Society on the basis of headings sanctioned by the Royal Institute of British Architects)

1. The Contractors are to provide everything of every sort and kind which may be necessary and requisite for the due and proper execution of the several works included in the contract according to the true intent and meaning of the drawings and specification taken together, which are to be signed by the Architect and the Contractors, whether the same may or may not be particularly

described in the specification or shown on the drawings, provided that the same are reasonably and obviously to be inferred therefrom, and in case of any discrepancy between the drawings and the specification the Architect is to decide which shall be followed.

2 The Contractors are to conform in all respects to the provisions and regulations of the Metropolis Local Management Act and the Metropolis Buildings Act, and to the regulations and bye-laws of the Metropolitan Board of Works and of the local authorities, and they are to give all notices required by the said Acts to be given to any local authorities, and to pay all fees payable under any of the said Acts to any such authorities or to any public officer in respect of the works.

3 The Contractors are to set out the whole of the works, and during the progress of the works to amend on the requisition of the Architect any errors which may arise therein, and upon request are to provide the necessary appliances or furnish the necessary vouchers to prove that the several materials are such as are described. The Contractors are to provide all plant, labour, and materials which may be necessary and requisite for the works, all materials and workmanship being the best of their respective kinds, and the Contractors are to leave the works in all respects clean and perfect at the completion thereof.

4 Complete copies of the drawings and specification signed by the Architect are to be furnished by him or by the measuring Surveyor to the Contractors for their own use, and the same or copies thereof are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the Contractors, and to whom instructions can be given by the Architect. The Contractors are not to sublet the works or any part thereof without the consent in writing of the Architect

5 The Architect is to have at all times access to the works, which are to be entirely under his control. He may require the Contractors to dismiss any person in the Contractors' employ upon the works who may be incompetent or misconduct himself, and the Contractors are forthwith to comply with such requirement

6 The Contractors are not to vary or deviate from the drawings or specification, or execute any extra work of any kind whatsoever, unless the same be required to comply with any of the provisions of any of the Acts of Parliament, regulations, or bye-laws hereinbefore mentioned, or unless upon the authority of the Architect, to be sufficiently shown by any order in writing, or by any plan or drawing expressly given and signed or initialed by him, as an extra or variation, or by any subsequent written

approval signed or initialed by him. In cases of day work, all vouchers for the same are to be delivered to the Architect or Clerk of the Works at latest during the week following that in which the work may have been done, and only such day work is to be allowed for, as such, as may have been authorised by the Architect to be so done, unless the work cannot from its character be properly measured and valued.

7. Any authority given by the Architect for any alteration or addition in or to the works is not to vitiate the Contract ; but all additions, omissions, or variations made in carrying out the works for which a price may not have been previously agreed upon, are to be measured and valued, and certified for by the Architect, and added to or deducted from the amount of the Contract as the case may be, according to the schedule of prices annexed, or where the same may not apply at fair measure and value.

8. All work and materials brought and left upon the ground by the Contractors or by their order, for the purpose of forming part of the works, are to be considered to be the property of the Employer, when payment shall have been made of the amount of any certificate in which the value thereof shall be included, and in such case the same are not to be removed or taken away by the Contractors or any other person without the special licence and consent of the Architect, but the Employer is not to be in any way answerable for any loss or damage which may happen to or in respect of any such work or materials either by the same being lost or stolen, or injured by weather or otherwise.

9. The Architect is to have full power to require the removal from the premises of all materials which in his opinion are not in accordance with the specification, and in case of default the Employer is to be at liberty to employ other persons to remove the same, without being answerable or accountable for any loss or damage that may arise or happen to such materials, and the Architect is also to have full power to require other proper materials to be substituted ; and in case of default the Employer may cause the same to be supplied, and all costs which may attend such removal and substitution are to be borne by the Contractors.

10. Should any of the works be, in the opinion of the Architect, executed with improper materials or defective workmanship, the Contractors are, when required by the Architect during the progress of the work, forthwith to re-execute the same, and to substitute proper materials and workmanship, and, in case of default of the Contractors in so doing within a reasonable time, the Architect is to have full power to employ other persons to re-

execute the work, and the cost thereof is to be borne by the contractors.

11. Any defects, shrinkage, and other faults which may appear within months from the completion of the building, and arising out of defective or improper materials or workmanship, are, upon the direction of the Architect, to be amended and made good by the Contractors at their own cost, unless the Architect shall decide that they ought to be paid for the same, and, in case of default, the Employer may recover from the Contractors the cost of making good the works.

12. The Contractors are to insure the building against loss or damage by fire, in an office to be approved, in the joint names of the Employer and Contractors for half the value of the works executed until it shall be covered in, and thenceforth until completion in three-fourths of the amount of such value, and are, upon request, to produce to the Architect the policies and the receipts for the premiums for such insurance. All moneys received under any such policies are to be applied in or towards the rebuilding or reparation of the works destroyed or injured. In case of neglect the Employer is to be at liberty to insure and deduct the amount of the premiums paid from any moneys payable to the Contractors.

13. The building from the commencement of the works to the completion of the same, is to be under the Contractors' charge, they are to be held responsible for, and are to make good all injuries, damages, and repairs occasioned or rendered necessary to the same by fire or by causes over which the Contractors shall have control, and they are to hold the Employer harmless from any claims for injuries to persons or for structural damage to property happening from any neglect, default, want of proper care, or misconduct on the part of the Contractors or of anyone in their employ during the execution of the works.

14. The Employer is at all times to have free access to the works, and is to have full power to send workmen upon the premises to execute fittings and other works not included in the contract, for whose operations the Contractors are to afford every reasonable facility during ordinary working hours, provided that such operations shall be carried on in such a manner as not to impede the progress of the works included in the contract, but the Contractors are not to be responsible for any damage which may happen to or be occasioned by any such fittings or other works.

15. The Contractors are to complete the whole of the works

16. If the Contractors shall become bankrupt, or compound with or make any assignment for the benefit of their creditors, or shall suspend or delay the performance of their part of the contract (except on account of causes mentioned in Clause 15, or on account of being restrained or hindered under any proceedings taken by parties interested in any neighbouring property, or in consequence of not having proper instructions, for which the Contractors shall have duly applied), the Employer, by the Architect, may give to the Contractors or their assignee or trustee, as the case may be, notice requiring the works to be proceeded with, and in case of default on the part of the Contractors or their assignee or trustee for a period of _____ days, it shall be lawful for the Employer, by the Architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorise him or them to use the plant, materials, and property of the Contractors upon the works, and the costs and charges incurred in any way in carrying on and completing the said works are to be paid to the Employer by the Contractors, or may be set off by the Employer against any money due, or to become due, to the Contractors.

17 When the value of the works executed and not included in any former certificate shall from time to time amount to the sum of £ . or otherwise, at the Architect's reasonable discretion, the Contractors are to be entitled to receive payment at the rate of 80 per cent. upon such value until the difference between the per-centage and the value of the works executed shall amount to per cent. upon the amount of the contract,

after which time the Contractors are to be entitled to receive payment of the full value of all works executed and not included in any former payment, and the Architect is to give to the Contractors certificates accordingly, and when the works shall be completed, or possession of the building shall be given up to the Employer, the Contractors are to be entitled to receive one moiety of the amount remaining due, according to the best estimate of the same that can then be made, and the Architect is to give to the Contractors certificates accordingly, and the Contractors are to be entitled to receive the balance of all moneys due or payable to them under or by virtue of the contract within months from the completion of the works, or from the date of giving up possession thereof to the Employer, whichever shall first happen. The Contractors are to be entitled to receive any sum reserved for painting and papering or otherwise, on the completion thereof. Provided always that no final or other certificate is to cover or relieve the Contractors from their liability under the provisions of Clause No. 11, whether or not the same be notified by the Architect at the time or subsequently to granting any such certificate.

18. A certificate of the Architect, or an award of the Referee hereinafter referred to, as the case may be, showing the final balance due or payable to the Contractors, is to be conclusive evidence of the works having been duly completed, and that the Contractors are entitled to receive payment of the final balance, but without prejudice to the liability of the Contractors under the provisions of Clause No. 11.

19. If the Employer shall make default in paying any moneys to which the Contractors may become entitled, for days after the amount thereof shall have been certified, or if the works be delayed for months by or under any proceedings taken by any other parties, the Contractors are to be at liberty to suspend the works, and to require payment for all works executed, and all materials wrought up, and for any loss which they may sustain upon any goods or materials purchased for the works, and in such case the Contractors are not to be bound to proceed further with the works contracted for. The Contractors are to be entitled to such interest and at such rate as the Architect shall certify upon all moneys payable to the Contractors, payment of which may have been unduly delayed.

20. Provided always that in case any question, dispute, or difference shall arise between the Employer, or the Architect on his behalf, and the Contractors as to what additions, if any, ought in

fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the Contractors, or by reason or on account of any directions or requisitions of the Architect, involving increased cost to the Contractors beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract except as to matters left during the progress of the works to the sole decision or requisition of the Architect under Clauses Nos. 1, 9, and 10, or in case the Contractors shall be dissatisfied with any certificate of the Architect under Clause No 7, or under the proviso in Clause No. 15, or in case he shall withhold or not give any certificate to which they may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of

Architect, or in the event of his death or unwillingness to act, then of Architect, being a Fellow of the Royal Institute of British Architects, or in the event of his death or unwillingness to act, then of an Architect to be appointed on the request of either party by the President for the time being of such Institute, and the award of such Referee is to be equivalent to a certificate of the Architect, and the Contractors are to be paid accordingly.

GENERAL CONDITIONS FOR BUILDING CONTRACTS.

Founded mostly on the 'General Headings for Clauses of Contract,' as settled between the Council of the Royal Institute of British Architects and the Committee of the London Builders' Society, 23rd December, 1870.

NOTE —For the sake of clearness, the Employer is described throughout in the 'singular number' and the Contractor in the 'plural'

1 The Contractors are in the best and most workmanlike manner to erect build execute and finish for the Employer the Buildings and Works included in the Contract according to the plans drawings and specification signed by the Contractors and by the Architect The Contractors are to provide all Plant Labour and Materials necessary and requisite for the due and proper execution of the several works described according to the true and reasonable intent and meaning of the drawings and specification

2 Complete copies of the drawings and specification furnished by the Architect or the Measuring Surveyors to the Contractors for their own use are to be kept on the buildings in charge of a competent Foreman to whom instructions can be given by the Architect

3 The Architect is to have at all times access to the works which are to be under his control with power to order any deviations therein or extra works he may consider necessary. The Clerk of the Works (should one be appointed by the Architect) is in his absence to be considered his deputy and his reasonable directions are to be in every case attended to subject to appeal to the Architect but the Clerk of the Works shall have no power of himself to direct any deviation from the Contract involving any increase of expense The Architect may require the Contractors to dismiss the Foreman or any person employed on the works who may be incompetent or misconduct himself and such person is not to be re-employed without the Architect's consent.

4 The Contractors or their Foreman are to set out under the direction of the Architect or Clerk of the Works the whole of the works and to amend on the requisition of the Architect any errors which may arise during their progress If any discrepancy appear between the drawings and the specification the Architect is to decide which shall be followed The Contractors are not to deviate from the Drawings or Specification unless upon the direction of the

Architect or they be required to comply with any Act of Parliament or local Authority.

5. No extra work is to be executed except upon the express order of the Architect to be shown by any instruction or subsequent approval in writing or by any Drawing Plan or Account signed or initialed by him. Provided always that if the Architect shall require the Contractors to execute any works as a variation which he may decline to order as an extra the Contractors may reserve the question of their right to be paid for the same until the final settlement of accounts. No charge for Day Work is to be allowed as such unless the authority for the work shall expressly direct it to be done as Day Work or unless the work cannot from its character be reasonably valued by measurement. All Vouchers for Day Work are to be delivered to the Architect within fourteen days following the week in which the work may have been executed. Any variation made in carrying out the works is not to vitiate the Contract but unless a price or schedule of prices be previously agreed on the value of all variations is to be ascertained by measurement or otherwise. All omitted works are to be deducted at prices not exceeding those contained in the Estimate on which the Contract was based and all additional works are to be valued at fair measure and value prices. The value so ascertained to be added to or deducted from the amount of the Contract.

6. The Architect is to have power to require the Contractors to remove from the premises all Materials not in accordance with the specification and in default in so doing for a reasonable time to employ other persons to remove the same without being answerable for any loss or damage that may happen to such materials. They are also upon request to furnish reasonable proof that the several materials are such as are described. Should any of the works be in the opinion of the Architect executed with improper materials or not in accordance with the specification the Contractors are when required by the Architect during the progress of the work (and notwithstanding any Certificate for payment which may have been given) forthwith to pull down remove the same and to substitute other materials and workmanship without extra charge unless in case of dispute the Referee or Referees shall decide that the Contractors should be paid for such substitution and in case of default of the Contractors in complying with such requirement within a reasonable time the Architect is to have power to employ other persons to remove and re-execute all such defective work and the cost thereof is to be borne by the Contractors and may if necessary be deducted out of any sum payable to them by the Employer.

7. All Work and Materials forming or intended to form part of the building contracted for are to be considered to be the property of the Employer when payment shall have been made of the amount of any certificate in which the value thereof shall be included after which payment the same are not to be taken away by the Contractors or any other person without the license and consent of the Architect but the Employer is not to be answerable for any loss or damage in respect of such work or materials either by the same being lost stolen or injured.

8. The Building from the commencement to the completion of the Works or delivering up possession of the same is to be under the Contractors' charge and they are to be responsible for watching and protecting the same and are to execute all repairs necessary to the same and they are also to hold the Employer harmless from any claims arising from any neglect or fault on the part of the Contractors or any one in their employ during the execution of the works.

9 The Contractors are to insure in an approved Office the Building and Works against Loss by Fire in the joint Names of the Employer and Contractors for half the value of the works executed until the building shall be covered in and thenceforth until completion in three-fourths of the amount of such value and are upon request to produce to the Architect the Policies and Receipts for the Premiums of such Insurance All moneys received under any such Policies shall be applied in or towards the rebuilding or reparation of the building destroyed or injured In case of neglect the Employer shall have power to insure and deduct the amount of premiums from the amount payable to the Contractors

10 The Contractors are to complete and leave the whole of the works clean and perfect (except the Painting and Papering or such other works as the Architect may desire to delay) within calendar months after the commencement of the same unless the works be delayed by inclement weather alterations or other causes not under the Contractors' control or in case of Combination of Workmen or Strike or Lock-out affecting any of the Building Trades and then the Contractors are to complete the works within such time as shall be reasonable and in case of default the Contractors are to pay or allow to the Employer as and by way of liquidated and agreed damages the sum of _____ per week for every week during which they shall be so in default until the whole of the works (except as aforesaid) shall be so completed provided the Architect shall in writing certify that the works could have been reasonably completed within the time appointed

the amount of such damages in case of dispute to be settled as hereinafter provided.

11. Any defects in the works which may appear within months from the completion of the building arising out of defective or improper materials or workmanship are to be amended and made good by the Contractors at their own cost and in case of default any cost incurred by the Employer in so making good the works may be recovered by the Employer from the Contractors the amount thereof in case of dispute to be settled as hereinafter provided.

12. When the value of the works executed and materials delivered not included in any former Certificate shall from time to time amount to the sum of £ the Contractors are to be entitled on Certificate of the Architect to receive payment at the rate of 80 per cent. upon such value until the difference between such percentage and such value shall amount to a sum equal to per cent. upon the amount of the Contract after which time the Contractors are to be entitled to receive payment in full for all works executed and work and materials delivered and not included in any former payment and when the works shall be completed or possession of the building shall be given up to the Employer the Contractors are to be entitled to receive one moiety of the amount remaining due according to the best estimate that can then be made by the Architect who is to give to the Contractors a Certificate accordingly and the Contractors are to be entitled to receive the balance of all moneys due or payable to them under or by virtue of the Contract within 3 months from the completion of the works or from the date of giving up possession thereof to the Employer whichever shall first happen Any sum reserved for Painting and Papering or otherwise under Clause 10 shall be paid to the Contractors on the completion thereof The Architect is to give to the Contractors the necessary Certificate and the Contractors are to be entitled to interest on any payments unduly delayed the amount thereof in case of dispute to be settled as hereinafter provided.

13 A Certificate of the Architect or an award of a Referee or Referees or Umpire showing the amount of the final balance of the accounts is to be conclusive evidence of the due completion of the works and entitle the Contractors to immediate payment but without prejudice to the liability of the Contractors to amend and make good any defects or other faults as provided in Clause 11.

14. If the Contractors shall become Bankrupt or make any Assignment for the benefit of their Creditors or shall suspend or

delay the performance of their part of the Contract except in case of inclement weather alterations or other causes as aforesaid Combination Strike or Lock-out of Workmen affecting any of the Building Trades or if the works be delayed for months by or under any proceedings taken by other parties against the Employer or Owner of the property or in consequence of not having proper instructions (of which the Contractors shall have given due notice) the Employer by the Architect may give to the Contractors or their Assignee or Trustee as the case may be notice requiring the works to be proceeded with and in case of default on the part of the Contractors or their Assignee or Trustee for a period of days it shall be lawful for the Employer by the Architect to enter upon and take possession of the works and to employ any other person or persons to carry on and complete the same and to authorise him or them to use the plant materials and property of the Contractors upon the works and the costs and charges incurred in any way in carrying on and completing the said works are to be paid to the Employer by the Contractors or may be set off by the Employer against any money due or to become due to the Contractors

15. If the Employer shall become Bankrupt or compound with or make any Assignment for the benefit of his Creditors or shall make default in paying any moneys to which the Contractors may become entitled for 14 days after the amount thereof shall have been certified or determined by Arbitration or if the works be delayed for months by or under any proceedings taken by other parties against the Employer or Owner of the property the Contractors are to be at liberty to suspend the works and to require payment for all works executed and all materials wrought up and any loss upon goods or materials purchased for the Works whether then delivered on the ground or not and in such case the Contractors are not to be bound to proceed further with this Contract.

16 Provided always that in case any question dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractors as to what additions if any ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the Contractors or by reason or on account of any directions or requisitions of the Architect involving increased cost to the Contractors beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed or as to the construction of these presents or as to any other matter or thing arising under or out of this contract except as to matters left

GENERAL CONDITIONS FOR BUILDING CONTRACTS.

during the progress of the works to the sole decision or requisition of the Architect under Clauses Nos. 4 and 6 or in case the Contractors shall be dissatisfied with any certificate of the Architect under Clause 5 or under the proviso in Clause No 14 or in case he shall withhold or not give any certificate to which they may be entitled then such question dispute or difference or such certificate or the value or matter which should be certified is to be from time to time referred without any suit at law or equity either to one Arbitrator to be agreed on mutually or to two Arbitrators one to be named by the Employer and one by the Contractors who shall have power to employ an Umpire if necessary to be nominated in case of difference at the request of either party by the President for the time being of the Royal Institute of British Architects The costs of any such reference shall be in the discretion of the Arbitrators or Umpire whose decision shall be final and binding upon all parties without any power of appeal and this submission may be made a Rule of any division of the High Court of Justice upon the application of either party.

SCHEDULE OF RULES FOR PROFESSIONAL PRACTICE AND CHARGES OF ARCHITECTS,

Published under the sanction of the Royal Institute of British Architects, and confirmed at a General Conference of Architects of the United Kingdom, 1872.

1. The usual remuneration for an Architect's services, except as hereinafter mentioned, is a commission of 5 per cent on the total cost of the works executed from his designs, besides which, all travelling and other incidental expenses incurred by the Architect are paid by the Employer, who may be also charged for time occupied in travelling if the work be executed at a considerable or inconvenient distance, or if more than ordinary personal attendance is required. The usual remuneration is at 5 per cent commission besides expenses,
2. But for all works in which the expenditure is mainly for skilled labour and not for materials, *e.g.*, in designs for the fittings except for decorative work.

and furniture of buildings, for their decoration with painting or mosaic, for their sculpture, for stained glass, and other like works, the Architect's charge is not made by way of commission on the cost, but should be regulated by special circumstances and conditions.

Repetition in some cases justifies a lower rate,

3. When several similar but distinct buildings are erected at the same time from a single specification and one set of drawings and under one contract, the commission of 5 per cent. should be charged on the cost of one such building, and a modified arrangement should be made in respect of the others.

and small outlay a higher rate of percentage

4. In works of small value, say £500 in amount, 5 per cent is not remunerative, and the charge should be by time or by an ascending scale, reaching 10 per cent. for works under £100.

Commission is to be reckoned as if for new materials and a builder employed and chargeable on all executed and 2½ per cent. on all omitted work

5. The commission is reckoned upon the total cost of the works, valued as if executed by a Builder, and of new materials. 2½ per cent. is charged upon any works originally included in the contract, but subsequently omitted in execution.

This is exclusive of the charge for measuring extras and omissions.

An Architect always entitled to payments on account.

6. The Architect is entitled during the progress of the building to payment on account at the rate of 5 per cent on the instalments paid to the Builder, or otherwise to half the commission on the signing of the contract, or the commencement of the works, and the remainder by instalments as above.

N.B. The terms of payment adopted by Her Majesty's Office of Works and Public Buildings may also be taken as an equitable method of payment on account, viz —

One-third part of the commission shall be paid to the Architect immediately after the signing of the contract ;

One-third part shall be paid to the Architect as soon as one-half of the contract sum has been paid to the Builder ,

And the remaining one-third part shall be paid to the Architect after the final payment to the Builder.

Charge for special services

7. The above charges do not cover professional services in connection with negotiations for site, in surveying it and taking levels, in making surveys and plans of buildings to be altered, in arrangements respecting party walls, or right

of lights, nor services incidental to arrangements consequent upon the failure of Builders whilst carrying out work, or in cases of subsequent litigation; but all such services are charged for in addition.

- 8 If the Employer, after having agreed to a design, and had the contract drawings prepared, should have material alterations made, whether before or after the contract is prepared, an extra charge should be made, unless such alterations are rendered necessary by an unreasonable excess in the Builder's tender beyond the Architect's approximate estimate. and material alterations of plan by time.
9. If the Architect should have drawn out the approved design complete, with plans, elevations, sections, and specification, the charge is half the commission upon the estimated cost. If he should, in addition, have procured tenders in accordance with the instruction of his Employer, the charge is one-half per cent. extra. Charge for plans and specification only half the commission, adding one-half per cent. if tenders are obtained.
10. For works in the alteration of premises, a special charge may be made on account of the special difficulties and trouble generally involved. Alterations to premises may be charged at higher rate
- 11 The following are the professional services included in the ordinary charge of 5 per cent :—
 - The requisite preliminary sketches, drawings, and specifications sufficient for an estimate and contract.
 - Detailed drawings and instructions for execution.
 - One set of tracings and duplicate specification.
 - General Superintendence of Works (exclusive of Clerk of the Works)
 - Examining and passing the accounts, exclusive of measuring and making out extras and omissions.The commission covers sketches, plans details one set tracings, and duplicate specification, instructions, superintendence examining accounts,
- 12 No additional remuneration is due for making an approximate estimate, such as may be obtained, for instance, by cubing out the contents. If a detailed estimate be required by the Employer, an additional per-centage charge may be made. also approximate estimate.
13. The charge per day made by Architects depends upon their professional position, the minimum charge being three guineas per day. The usual charge per day.
14. The above payments alluded to in this document are to be made by the Employer to the Architect, who is not to receive commission or payment of any kind from the Builder, or any tradesman, in respect of works executed under the Architect's direction. All payments to Architect to be from Employer.

- Quantities.** 15. When an Architect supplies Builders with quantities, on which to form tenders for executing his designs, he should do so with the concurrence of his Employer, and it is desirable, when practicable, that the Architect should be paid by him rather than by the Builder, the cost of such extra labour not being included in the commission of 5 per cent.
- Ownership of drawings.** 16. In respect of the ownership of drawings and specifications, it has hitherto been the general custom for the Architect to be paid for their use only, those documents remaining his property.
- N.B. In case of sketches for works abandoned, this custom is recognised by the Office of Her Majesty's Works and Public Buildings. No authoritative decision in the Court of Law has, however, as yet been given on the subject it is therefore desirable, for the present at least, that the Architect should have a distinct understanding with his Employer on this point
- Estates.** 17 The charge for taking a plan of an estate, laying it out, and arranging for building upon it, should be regulated by the time, skill, and trouble involved
18. For actually letting the several plots (in ordinary cases) a sum not exceeding a whole year's ground rent may be charged
19. For inspecting the buildings during their progress (so far as may be necessary to ensure the conditions being fulfilled); and finally certifying for lease, the charge should be a per-centage not exceeding one-half per cent. up to £5000, and above that by special arrangement.
- 20 All the above fees to be exclusive of travelling expenses, and time occupied in travelling, as before mentioned.
21. The charge for the above does not include the commission for preparing specification, directing, superintending, and certifying the proper formation of roads, fences, and other works executed at the cost of the Employer, nor for putting the plans on the leases.
- Valuations.** 22. The following definite charges are recognised for valuation of property :—
- The charge throughout is 1 per cent on the first £1000, and half per cent. on the remainder up to £10,000 Below £1000 and beyond £10,000 by special arrangement.
- These charges do not include travelling expenses, nor attendance before juries, arbitrators, &c.

13. And that the parties respectively shall produce before the arbitrator all books deeds papers accounts vouchers writings and documents within their possession or control which the arbitrator may require and call for as in his judgment relating to the matters referred.

14. And that the parties respectively shall do all other acts necessary to enable the arbitrator to make a just award and that neither of them shall wilfully and wrongly do or cause to be done any act to delay or prevent the arbitrator from making his award.

15. And it is further agreed that the said parties their executors and administrators shall on their respective parts in all things stand to obey abide by perform fulfil and keep the award so to be made and published as aforesaid.

16. And that none of them shall bring or prosecute any writ of error or any action or suit at law or in equity against the arbitrator or against any other of them concerning the matters referred.

17. And it is further agreed that in the event of either of the parties their executors or administrators being dissatisfied with the award or disputing its validity and moving the Court to set the same or any part thereof aside the said Court whether the award be insufficient in law or not shall have power if it shall think fit to remit the award or the matters hereby referred or any of them from time to time to the reconsideration and determination of the said arbitrator.

18. In witness whereof the said parties have hereunto set their hands the day and year first above written.

A B
C D.

1. WHEREAS by a certain agreement in writing bearing date the
day of A.D. between

reciting that

* As to the stamp requisite for an award, see *ante*, p 121.

matters in difference between the parties up to the time of the submission to arbitration '']].

(When One Party is to Pay the Costs.)

3. I award and direct that the said do pay
to the said the costs incurred by the said
of and incidental to the reference and award.

[*When the arbitrator is to ascertain the amount add the following words*] And I assess the amount of the said costs of the said
at £ and the costs of my award

at £

(Or when each Party is to Pay his own Costs.)

4. And I award and direct that the said and the
said do each bear his own costs of the reference
and pay one-half of the costs of the award.

In witness whereof I have hereunto set my hand this
day of A.D.

V X.

Signed and published in the
presence of Y Z.

IN THE EXCHEQUER CHAMBER.

IN ERROR FROM THE COURT OF EXCHEQUER.

27th of November, 1874.

(Before Lord Coleridge, Chief Justice, Mr. Justice Lush, Mr. Justice Grove, Mr. Justice Quain, and Mr Justice Archibald.)

*LAIDLAW v. THE HASTINGS PIER COMPANY.**

THE plaintiffs contracted to erect a pier for the defendants. Payments were to be made on production of the Engineer's certificates. Penalties of £20 a week were to be retained by the defendants if the work was not completed by the 16th of March, 1871, payments were made by the defendants after that date, without retaining any sum for penalties;

Held, that by so doing the defendants had, by their conduct, disentitled themselves to insist upon the penalties.

By the contract the Engineer had power to extend the time for the completion of the work. He sent in certificates from time to time after the 16th of March, 1871, and in his final certificate no account was taken of the penalties;

Held, that this afforded evidence that the Engineer had extended the time.

By the contract it was provided that no extra work should be paid for unless the contractors should produce special and positive written instructions for it, signed by the Engineer, and countersigned by the Chairman of the Company. The Engineer was to furnish monthly certificates of the value of the work executed, including extra work, and the contractors were to be paid 85 per cent of the amount forthwith, and the balance at the expiration of three calendar months after the certificate of the Engineer of the satisfactory completion of the work should have been given, provided that within three months after the giving of such certificate the contractors should have delivered to the Engineer a full account of all claims which they might have upon the Company, and he should

* Mr. Watkin Williams, Q.C., and Mr. Holl, Q.C., have kindly perused the proof-sheets of this report, and they have authorised us to state that it is correct. It was taken from the shorthand writer's notes.

have given a certificate of the correctness of such account. Any disputes or differences arising upon any matter connected with the contract were to be referred to the Engineer, whose decision was to be conclusive.

The Engineer certified for, as extra, work which had not in fact been done at all, and work which, although extra, had not been done on signed and countersigned orders.

Held (Mr Justice Grove and Mr. Justice Quain dissenting), that the last certificate of the Engineer precluded the defendants from raising the question whether extras had been done, or done without countersigned orders.

Held also (Mr Justice Grove and Mr. Justice Quain dissenting), that the facts stated in the case showed that differences had arisen, and that the certificate of the Engineer was a decision upon them within the meaning of the contract.

This was an appeal from a judgment of the Court of Exchequer in favour of the plaintiffs.

Mr. Watkin Williams, Q.C., and Mr. A. L. Smith appeared for the plaintiffs, Mr. Prentice, Q.C., and Mr. Holl for the defendants.

The questions which were raised, and the parts of the contract which are material, appear from the judgments.

Lord Coleridge, Chief Justice. This is an appeal from the decision of the Court of Exchequer. That Court decided that the plaintiffs were entitled to recover. Now the plaintiffs are contractors, who entered into a contract with the Hastings Pier Company to erect a pier. The stipulations of that contract, so far as they are material, I will allude to in a moment, but generally speaking the work was to be executed under an Engineer, according to plans, drawings, and specifications, and there were to be from time to time payments of money on account, to the amount of 85 per cent on work done under the contract, and on work done extra to the plans, drawings, and specifications of the contract, but provided for as extras within the terms of the contract itself. The work was done, and large payments were made from time to time, in point of fact, both for work done according to the plans, drawings, and specifications, and also for the work done extra to them. Considerable sums of money were paid upon monthly certificates by the Engineer, upon both heads of work. Now, the pier was completed, and has been taken-to by the defendants, and I do not understand that any complaint has been made as to the goodness of the work done. A large sum of money, between £15,000 and £20,000, has been paid. The action is brought for a sum of between £5,000 and £6,000, the balance said to be due

upon the works specified for, and works extra those specified for. The sum of £2,000 is paid into Court, and the action is brought for the remainder. A good many questions have been raised and argued before us, but substantially the objections taken by the defendants to the payment of the money plus the money paid into Court resolve themselves into but a few. First of all, they say these works were done extra to the contract. They were done extra to the contract, but in the contract itself are to be found provisions requiring them to be done in a particular way, and after certain conditions precedent have been fulfilled. The conditions precedent have not been fulfilled. They say the Engineer, who has certified for these works, which by the contract he must do before the plaintiffs could bring their action, exceeded his jurisdiction in so certifying, and we have a right to examine into the matter just as if he had not given those certificates, at all events, to the extent to which his jurisdiction was exceeded, and to that extent we decline to pay. We say that there are mistakes in these accounts, that the Engineer has certified on mistaken grounds, that as to some matters, whether they have been done or not, in point of fact they have not been done according to the conditions precedent in the contract, and therefore we refuse to pay. Further they say, 'We have never led the plaintiffs to believe we did not intend to act on the terms of the contract, we have done nothing to change their position, or to disentitle us to insist upon the contract, and we insist upon it' Then further they say, 'The contract stipulates for the payment by the plaintiffs of certain penalties in the event of the non-completion of the works within the terms of the contract within a specified time, that time has been exceeded, those penalties have been incurred, and we desire to set off those penalties against the sum of money claimed by the plaintiffs in this action.'

Now I will deal with the last question first, because it really has not been seriously argued before us. I am of opinion that the contention in respect of the penalties is not well founded. The Court of Exchequer decided against the defendants upon the question of whether they had a right to set off the penalties, and I am of opinion that the Court of Exchequer decided rightly. It appears to me that they have by their conduct disentitled themselves to insist upon the penalties, because the penalties, as I understand, are to be reserved* or retained by them the moment they accrue

* The following is the clause in the deed referred to — 'The whole of the works . . . shall be completed and handed over to the Company by the contractors within fifteen calendar months after the date of the Engineer's order to commence the work, and in case the said works are not completed within the said period of fifteen calendar months, or within such extended

from time to time; and they have not been so retained by them. They have paid money for fourteen months subsequently to the first accruing of the penalties (if they were entitled to act upon the penalty clause), and I am of opinion that they must be considered to have put an end to that clause of the deed. But, independent of that, I am of opinion that the clause of the deed giving the Engineer power to extend the time for the completion of the contract puts them out of Court, that there is overwhelming evidence that the Engineer did so extend the time. He sent in his certificates from time to time for work done after the time stipulated by the contract had long elapsed. His final certificate was sent in, taking no account of the penalties, and as no particular form is set out in this deed in which the Engineer must exercise the power undoubtedly given to him, I am of opinion that he has exercised that power, and that on both those grounds our judgment should be against the defendants on this point.

Then there comes the far most important question, whether the provisions of the deed are so clear and the position of the Engineer is so ascertained that the defendants are not entitled to take advantage of certain mistakes which from the case it is admitted might be discovered, if it were possible to reopen the accounts certified by the Engineer * It is found that those mistakes amount to a considerable sum, it is not said what, but they are classed under various heads, into the details of which heads it is not necessary to go, but it is enough to say in general that it is ascertained by the case that

period as hereinafter mentioned (any delay that may arise from loss of vessels conveying the materials, or damage by storm, or other the act of God excepted), the said contractors shall forfeit and pay to the Company 20/ a week to be paid to, and retained by the Company as ascertained and liquidated damages, and not by way of penalty, for each and every week during which such work shall remain unfinished, after the expiration of the period above mentioned, and the Engineer shall have power to delay the execution of the works on account of stormy weather or for any other cause which in his discretion he may deem proper and sufficient, and shall also have power to grant such extension of time for completing the whole of such works as he may consider to be required in respect of any such delay or of any additions or alterations made to the works which may render an extended time necessary for their due execution'

* It was stated in paragraph 42 of the case that. 'amongst the items charged for as extras in the plaintiffs' account, and included in the certificates given by the Company's Engineer, are claims made by the plaintiffs for work as extras which has never in fact been done. Also, among the items charged as extras in the said account and included in the said certificates are claims made for work and materials as extras which are in fact included in the drawings and specifications which formed part of the contract. Also, amongst the items charged for as extras and included in the said certificates are claims in respect of works and materials which have been substituted in lieu and instead of other works and other materials which were included in the contract, but which have not been executed, and although the plaintiffs in their said account for extras and the Engineer in his said certificates have included the full value of such substituted works and materials, they have made no deduction therefrom or allowance in respect of the works and materials so included in the contract, but left unexecuted.'

there have been mistakes. The sums awarded are certified by the Engineer, and the important question in the case is whether the defendants are entitled to discredit his certificates, to go behind them and to reopen the accounts he has so certified. Now, I think they are not, and I agree with the Court of Exchequer that on this point too judgment should be entered for the plaintiffs.

Now, this deed is a deed in some respects of a peculiar kind. It does not appear to have been drawn according to the exact precedent of any other deed which, at least in the decided cases that I have looked at, has been brought under discussion in a court of law, and there has been a great deal of argument in discussing the particular provisions of the deed in order to ascertain what is the exact position of the Engineer of the Company under it. Now, the points which it is alone material to state for this purpose are these: there is a claim by the plaintiffs, there is a resistance by the Company, and there are certificates, which, if they are final and cannot be examined, are conclusive that the sum of money sued for in this action is due to the plaintiffs. The questions upon this matter are simply . is the final certificate, and are the other certificates, of the Engineer conclusive as to the facts ascertained in them, so that the defendants must pay, even if there have been errors in those certificates, which, for the purpose of discussing the question, I will assume to be the fact. Now the matter has been argued upon several grounds, distinguishable in idea and distinguishable in point of fact. It has been said first of all that the Engineer is placed in a position under the deed to exercise particular functions, and that the case has arisen for the exercise of those functions, that he has exercised them in fact, and that his exercise is therefore conclusive upon the parties. It has also been put, not exactly that he fills the position of agent to the defendants, clothed with peculiar functions as between the plaintiffs and the defendants, but that he is by the terms of the deed—I do not like to use the word *quasi*-arbitrator, because the moment you introduce the word *quasi*, you introduce indefiniteness into legal decisions—but I take it that it must be understood he is made by the deed an arbitrator, and if there has been a reference to him of matters in dispute between the plaintiffs and the defendants, he is made arbitrator by the deed, and his decision is final.

Now, I think, speaking for myself, that the true view of the Engineer's position under the deed is not the latter, but the former view. I do not think that he is an arbitrator under the deed. I do not think that a submission of differences in the ordinary sense of the word, and a decision thereupon as an arbitrator's decision,

was necessary under the provisions of the deed. He appears to me, from the beginning to the end of the deed, out of the four corners of which his position and authority are to be collected, to have been treated as agent to the defendants, but agent to the defendants clothed with peculiar functions, and those are to be exercised in certain cases provided for by the deed, and when he exercises those functions, they are to be conclusive, or otherwise, according as the deed provides. Now, let us see what are those provisions. I do not propose to read the whole of the deed, but to take merely one or two provisions which have to do with the matter now in dispute. The deed, after a recital that the plaintiffs have agreed to execute certain works and to complete them, the completion to be certified as hereinbefore mentioned, goes on to provide that the drawings and specifications contained in the schedule hereto annexed, and the provisions of these presents, shall be taken together to explain each other, and that if in the execution of the work it should be found that anything has been omitted or any discrepancy exists between the drawings and specifications, or between the different portions of the drawings themselves, or if any doubt should arise as to the intent or meaning of any part of them, reference shall be made to the Engineer, whose decision shall be conclusive. I apprehend, therefore, without discussing what the earlier part of these words may mean, that if a doubt arose as to the drawings and specifications, to the extent of its being disputed whether a particular amount of work or a particular kind of work was or was not within the fair construction of the contract, or was an extra outside the contract, that was a matter of which reference should be made to the Engineer, and that upon that fact the Engineer's decision should be conclusive. I quite agree that the provision, stopping there, says nothing about payment, and therefore it would be quite true that so far the deed would only provide that in the event of the question arising, extra or no extra, the decision of the Engineer upon that fact would be final and conclusive, leaving the other matters as to payment and so forth unprovided for. Then it goes on to say shortly afterwards that the execution of the works shall be carried out under the entire control and superintendence, and according to the directions of the Engineer, or of a superintendent approved by him, and that the contractors shall attend to and execute without delay all orders and directions in respect of the execution of the contract given to them by the Engineer or superintendent. Here, therefore, is a provision subordinating the plaintiffs in the execution of the works entirely to the Engineer, or to a deputy to be appointed by him, and at once and without delay they are to

execute all orders and directions in respect of the execution of the contract given them by him. That must include, not only in its very terms, but in any reasonable construction of it, extras. I should think in its very terms it must include extras, because the contract provides for extras and contemplates extras. In a contract of this kind, almost of necessity, something not specified for will arise in the execution of the works, and when it does arise, and the Engineer orders it to be done, the contract makes it an absolute and unqualified duty on the part of the plaintiffs to execute it without delay. That is important as showing the position in relation to the plaintiffs which the Engineer, the agent of the defendants, occupies. I agree further that there is no stipulation here as to the payment, and it is left entirely at large so far. It is important as showing the great control taken by the defendants into their own hands through their Engineer.

Then we come to the question of what may be called extras; and upon the question of direct extras, the provision is this: 'In case the Engineer shall consider it desirable to order additional work, or to increase, alter, or diminish the quantities, or the dimensions, or alter the character of the works described in the contract, drawings, and specifications, such additions, diminutions, or alterations shall not in any way vitiate this contract, but shall be performed by the said contractors under all the conditions, stipulations, and responsibilities therein contained, in like manner as if they had been expressly described and included in the specifications and drawings' Now, that makes all extras and additional work ordered by the Engineer as if it had been included in the contract. It brings the execution of such extras within the provision I have just read, and subordinates the plaintiffs in their execution to the absolute and uncontrolled authority of the Engineer, who can order them to be executed without delay. They are to be executed in every respect as if they had been included in the contract, 'save and except that the value of such additions, diminutions, and alterations shall be estimated according to the schedule of prices hereto annexed, and the value so ascertained shall, as the case may require, be added to or deducted from the money payable to the said contractors under these presents.' Then these distinct extras are made part of the contract, are subordinated to all the rules of the contract, are put under the authority of the Engineer, and when done they are to be paid for according to the schedule of prices, and are to be paid for as if they had been performed under the direct stipulations of the contract, that is by monthly instalments up to 85 per cent. upon certificates to be given by the Engineer.

Now, so far as to the power of the Engineer and the duty of the plaintiffs, up to this point there is nothing said as to payment. Then comes the provision on which reliance has been placed by the defendants: 'And the contractors shall not be allowed to plead any acts, orders, or directions of the Engineer or any person acting on his behalf in justification of any departure from the requirements of the contract, unless they shall produce special and positive written instructions to such effect, signed by the Engineer, and countersigned by the Chairman of the Company' That particular provision is not material, because it is not said there has been any departure from the requirements of the contract. But it goes on to say that no additional or extra work, that is to say, the additional or extra work that is described in the paragraph to which I have been referring, 'shall be paid for, unless it has been executed under the authority of such signed and countersigned instructions.'

Now, therefore, it is in effect said, you must do it, but before you do it you must have signed and countersigned instructions, or you will not be paid. If that stood alone and nothing further was to be found in the contract, that no doubt would be a very strong passage in favour of the defendants, and it is upon that passage I conceive that the argument for the defendants must mainly rest, and on which the difference of opinion which I regret to have arisen on the Bench, I believe is founded. That says, they shall not be paid for unless they are done upon orders signed by the Engineer and countersigned by the Chairman of the Company. Then it goes on to say how they shall be paid, and some way on in the contract this passage occurs, and as the whole of it is important, it must be taken together, and upon the construction of it I, for my part, base this portion of my judgment 'The Engineer shall furnish monthly certificates of the value of the work executed and materials delivered, which certificates shall also include any extra or additional work, according to the terms of this contract, and 85 per cent. of the amount thus certified shall be forthwith paid to the contractors, and the balance shall be paid at the expiration of three calendar months after the certificate of the Engineer of the satisfactory completion of the works shall have been given, provided that within three calendar months after such certificate the contractors shall have delivered to the Engineer a full account in detail of all claims they have on the Company, and the Engineer shall have given a certificate in writing of the correctness of such claims, and if at any time during the progress or after the completion of the contract, any disputes or differences shall arise between the Company and the contractors as to the manner of executing the works, or as to the quality and

quantities of the materials employed, or as to any charge, or as to any other account or thing arising out of or connected with the contract, the disputes or differences shall be referred to and settled by the Engineer, whose decision shall be binding and conclusive on both parties, and that in case of non-performance by the contractors of any of the stipulations contained in these presents, the Engineer shall be at liberty to withhold all or any of the certificates until such stipulations are complied with, and the decision of the Engineer shall be final in respect of every question concerning the construction of the works to be done by the contractors, and the plans, sections, and drawings, and the nature of the materials, and the completion and condition of the work.'

I say that even if those provisions ended with that which states that the monthly certificates were to be given, and that 85 per cent. was to be paid at once, and the remaining 15 per cent. within three months after the completion of the whole work to the Engineer's satisfaction, I think it would be difficult to say that the defendants could go behind the final certificate of the Engineer, and could claim to reopen all the questions with regard to the extras, which had been done to the satisfaction of the Engineer, done upon the orders of the Engineer, which the contractors could not upon the terms of the contract refuse to perform at once and without delay, upon the ground that some of them or the majority of them had not been done in point of fact on signed and countersigned orders, and that the defendants could resist payment on that ground. The signature and countersignature is no doubt a condition precedent to the right of payment, but so is the completion of the work, so is the completion of the work to the satisfaction of the Engineer; but so are a variety of other matters all conditions precedent. But all those matters are to be taken into account, as it seems to me, by the Engineer, the agent of the defendants, to protect them; and when a request is made for the sending in of an account, the right to which is to be ascertained by certificate, the Engineer is to go into all those matters, is to satisfy himself that the conditions precedent to a right to payment have been fulfilled, and he would have neglected his duty if he had certified for any work if any of the stipulations of the contract which he, as the agent of the defendants, was to enforce, had not been complied with by the plaintiffs. But when the Engineer has once ascertained, and has once given his decision, that the right to those payments has arisen, a condition precedent to their arising being this, that and the other circumstances having occurred, it does not lie in the mouth of the defendants, it seems to me, who have placed their own

agent in the position of absolute control over the plaintiffs to see that the work is done, and not to certify unless it is done according to the contract, to say, You have neglected your duty to us, and therefore we will not pay according to your certificates. If it were not for the difference which exists on the Bench, I should have said it was a clear enough thing that, even if it stood alone, these certificates would be conclusive, and the defendants would be bound by them, but it does not stop there, for it goes on to say, in words which I have read once, and which I will not repeat, but which I will only say appear to refer to every kind of dispute or difference that could arise upon the contract, that if any dispute about those works, or any charge or account whatever should arise between the plaintiffs and the defendants, the Engineer of the defendants is to decide, and his decision is to be binding on both parties. It seems to me, therefore, that upon that ground too, which requires little further explanation, it is plain that the plaintiffs must succeed in this action, because, as I think, differences and disputes did arise between the plaintiffs and defendants—differences and disputes contemplated in this very section of the contract, they were submitted, within the meaning of the contract, to the Engineer of the defendants, and he decided thereupon, and his decision is therefore binding. He decided as he was bound to do in the discharge of his duty. Therefore, whether I look at the matter as a matter of certificates simpliciter, or whether I look at it as a dispute and difference decided in the form of a certificate, in either case it appears to me that on the true construction of this contract these certificates are conclusive, and that the defendants must pay.

Now, I think that differences did arise, and that there was a submission and a decision within the meaning of this contract. (His Lordship then examined the evidence bearing upon this question, and continued.)

Now it appears to me that there was a claim made for a certain sum in respect of certain extras, that those extras were matters the payment of which the defendants intended to dispute, that the matter was referred in the fair ordinary sense and meaning of that word to the Engineer, because he was asked to look to it, and to take this and that into account before he decided, that he did look through it, and did ascertain that certain things were, in his opinion, due, and that certain things were not due, and that he certified for the balance which he thought was due, and in my opinion that was a decision within the meaning of the contract. It seems to me that a technical submission and a regular formal reference were not re-

quired by this deed. (His Lordship then stated that he thought that the case of *Goodyear v. The Mayor of Weymouth* * was rightly decided, and that the principle of that case was applicable to the present, and said that in his opinion the plaintiffs were entitled to judgment, and that the judgment of the Court of Exchequer should be affirmed)

Mr. Justice Lush : I do not think that it is necessary that I should add anything to the judgment which has just been delivered by my Lord, and I simply desire to state that I agree with him in all that he has said.

Mr Justice Grove : Upon the two main points the balance of my mind is against the judgment of the Court of Exchequer. Upon the question of penalties I agree with my Lord and my brother Lush. The difference of opinion which I am now expressing does not arise upon any legal principle, but I cannot see that the facts make out such a case as, it seems to me, ought to be made out before an explicit provision in the deed is entirely abrogated. Now, that provision is : 'In case the Engineer shall consider it desirable to order additional work, or to increase, alter, or diminish the quantities or the dimensions, or alter the character of the works described in the contract, drawings, and specifications, such additions, diminutions, or alterations shall not in any way vitiate this contract, but shall be performed by the said contractors.' I do not read the rest of it, but I give every force which can be given to the remaining words, and I quite admit that if that clause stood alone, and if that portion of the deed had ended with the words 'under these presents,' that that would have given the Engineer power to order any extras, and to insist on their being performed, and that the Company would be liable to pay for them. But then the deed goes on thus, and it follows so immediately that it must be taken as part of the same provision 'And the said contractors shall not be allowed to plead any acts, orders, or directions of the Engineer, or of any person acting on his behalf, in justification of any departure from the requirements of the contract, unless they shall produce special and positive written instructions to such effect, signed by the Engineer, and countersigned by the Chairman of the said Company, and no additional or extra work of any kind or description whatsoever shall be paid for unless it has been executed under the authority of such signed and countersigned instructions.' The meaning of that appears to me to be this : the Engineer when extras are wanted is to draw up instructions, and before those instructions have the force of an order, they

* *Goodyear v. The Mayor of Weymouth*, 25 L. J., C. P., 12.

must be countersigned. If I rightly read the word 'order' as an order consistent with the contract, unless that is either dispensed with by a waiver or overridden in some way, it appears to me that the defendants are entitled to the benefit of that clause which they have inserted for their own protection, and without which they would be at the mercy of their Engineer. The object of the clause seems to me to be extremely plain. The question is not what is the meaning of the clause, but has it been dispensed with or overruled by the conduct of the parties, or by the authority vested in the Engineer by another provision of the deed. (His Lordship then referred to those parts of the case and of the correspondence which bore upon the question of waiver, and proceeded.) I cannot see that there is any satisfactory proof that the defendants, either by the correspondence or by their conduct coupled with the correspondence, waived that provision.

Now I come to the only other point upon which I have the misfortune to differ from other members of the Court. I am bound to give the result of my judgment on the matter, and that is, that the last certificate does not amount to a decision within the meaning of the reference clause. It does not amount to a decision of the arbitrator, and therefore is not so final and binding as to excise from the deed the provision as to countersignatures by the defendants. Now, the provisions of the deed are as follows (his Lordship then read the arbitration clause).

Now, it seems to me that here the position of the Engineer is changed. Up to this time, in all parts of the deed, the Engineer is supposed to be a representative to a great extent of the defendants; but here he is invested with a new character, because here, when a dispute has arisen between the contractors and the Company, it is to be referred to and settled by the Engineer. I admit that extras would come within this clause. I quite concede that no particular form of reference is necessary, but I think that it should be substantially understood between the parties that there is a dispute which the Engineer is to decide in the capacity of judge, and not as the defendants' representative. I do not think that the correspondence shows that he has decided as judge, having heard the representations of both parties. My Lord has read the correspondence. It amounts to this. A certificate is sent in for £2,000 beyond the contract price. The defendants wrote and complained of this to the Engineer. But the Engineer, although frequently written to by the order of the directors, never sent an account with observations as requested by them. The Engineer never appears to have entered into the matter in the capacity of judge. He first sends in a certificate that £1,500

is due on account of the contract and extras, and says that he will decide the balance as soon as possible, and communicate the result. Does 'decide' then mean, 'I will decide the matter as judge,' or does it mean, 'I will look into the matter, and see whether the work has been done'? It admits of both interpretations. But then they request to have a copy of the account with his observations, which seems to me to mean this: 'We will not dispute about any extras which we think necessary or desirable, but we have retained a voice as to extras within the contract, let us look into them before you decide.' He does not furnish them with the materials they ask for, but he ultimately gives a certificate, not as the decision of a judge, but a certificate stating that the plaintiffs have done work to the amount of £570. That is the last certificate, and it appears to be in the form of the previous certificates. Therefore, it does not appear to me that here the Engineer really did take upon himself the functions which he had a right to take upon himself, or which the parties might invest him with under the deed, but that he absolutely does not adopt the character of being a judge, instead of the representative of the defendants, and actually sends in his account without listening to them or telling them, 'I am going to give judgment against you, have you anything to say on the subject?' If the Engineer had, as in the case of *Goodyear v. The Mayor of Weymouth*,* been an absolute judge of the matters, quite irrespective of any control which the defendants might exercise, the case would be different. Chief Justice Erle there says 'The Architect was the supreme judge as to extras and additions. This undefined claim as to work said to be independent of the contract would be within the words, "contracted for and connected therewith."' Mr. Justice Keating says: 'The contract gives the Architect jurisdiction over all extras and additions,' which I venture to say the contract here does not, 'and all the items resolve themselves into these.' Therefore it does not appear to me that the facts of this case bring it within the case of *Goodyear v. The Mayor of Weymouth*, because here the Engineer has two functions to fulfil, the one as Engineer, in which he would come within that case, having arbitrary powers as to what he should compel to be done, and how he should compel it to be done by the plaintiffs, and also to give certificates which are compulsory as to payment by the defendants, but when it comes to a dispute as to extras, I do not think that they are within that arbitrary power. If he has to decide as a judge, he changes his functions, and he could not then decide as if they were going on with the work over which

he had arbitrary power. He should, at all events, perform the first function of a judge, which is to hear both sides before he decides. At all events, he should have let the parties know that he intended to act under this clause as a judge. It appears to me that he has not done so, and therefore I cannot say that I am satisfied that he did act under that clause. If he did, I should agree with the majority of the Court, that his decision was final. As the majority of the Court are in favour of the respondents, it is unnecessary for me to enter into the other parts of the case.

Mr. Justice Quain. In this case I agree with my brother Grove, and think that the judgment of the Court of Exchequer should be reversed. I have, therefore, the misfortune with him of differing from the judgment of this Court, and from the judgment of the Court of Exchequer; but having considered this case according to the best of my judgment for two days, I am unable to agree with the conclusion at which the majority of the Court have arrived. I might probably have contented myself with saying that I agree with my brother Grove, for the reasons he has given, and in which reasons I entirely concur, but seeing the importance of the case and the great weight of authority against us, I feel it right to state my own views for coming to this conclusion.

Now the first question we are asked is, are the certificates of the Engineer conclusive of the amount to be paid by the defendants to the plaintiffs, so as to preclude the defendants from going in any way behind the certificates, or making any deduction in respect either of unfounded charges or for penalties? And I find that in paragraph 30 of the case the same contention is stated on behalf of the defendants. They contend that the certificates, without mentioning any particular certificate, are conclusive. I confess I was at first rather astonished that those certificates, which were given from time to time, and which, as the recital of the deed states, are given merely for the purpose of enabling the contractor to get instalments from time to time to put him in funds, as it were, for carrying on the work, and which are given from month to month hastily, and in which there are often mistakes by the contractor's agent on the one hand, and by the Engineer on the other, should be considered conclusive, either as to the work having been done, or as to the value of it. These certificates are merely provisional and temporary. I am now speaking of what are called 'progress certificates,' given from time to time solely with the view of enabling the contractor to get the 85 per cent., and I have never heard, until the contention in this case, that, in any sense of the word, they could be considered conclusive.

Now, I think I am right in saying that it is not contended now that these certificates given from time to time are conclusive, if you could show that the work contained in them was never done. But I believe it is now contended that these certificates taken together with the document of October 19 are conclusive of this case, and that they shut out all inquiry even as to whether the work was ever done to which they relate, or whether those extras were executed under proper authority. That is a very strong proposition, and it appears to me that it lies upon the plaintiffs to make it out to the fullest extent.

Now, let us see what the certificates are. They are described in the way in which certificates are generally described, and it is recited, 'And whereas the Company have agreed to advance to the contractors from time to time during the progress of the works so contracted to be done by them, sums of money by way of instalments upon account of and in part payment of the works then actually done and executed by them, such executions to be certified by the Engineer of the Company' Therefore they are for the purpose of paying in advance during the progress of the works sums of money by instalments. I do not really understand on what principle any such certificates, really for the purpose of calculating the amount of the instalments to be paid on account, can be conclusive as to the work that was done, or whether there was any work done, or whether there were extras or not. It strikes my mind as obvious that this kind of provision is intended merely as temporary and provisional, leaving a considerable margin, so that when the parties come to the end of the contract, they shall consider what and how much is to be paid.

This is what is called a lump sum contract; it is not a contract to be paid for by measure and value. It has a schedule of prices to regulate the extra work. Where are there any words in the case that make these certificates in the slightest degree conclusive, or that state that you shall not go behind them to show that there were mistakes in them? I should say that the strongest possible words were necessary to make it conclusive. I find no such words here, and the very nature of it appears to me to be in direct opposition to such a view.

The progress certificates went in from time to time, and finally a certificate is given on the 14th of October for £1,500, and a further and final certificate for £570 is given on the 29th of October, being the last progress certificate given by the Engineer, and on that day he sent in a detailed account—he does not call it a certificate—at the bottom of which he wrote these words: 'The above no-

count as altered in red ink is approved by me.' Now, that is not a certificate for the £570, because he had no authority to give it. That did not become due until three months after he had given his certificate that the works had been satisfactorily completed, which he did on the 14th of October. That document was sent in under the express provision of the contract which provides, 'And the balance shall be paid at the expiration of three calendar months after the certificate of the Engineer of the satisfactory completion of the works shall be given, provided that within three calendar months after the giving of such certificate the said contractors shall have given to the Engineer a full account in detail of all claims they have on the Company, and the Engineer shall have given a certificate in writing of the correctness of such account.' In order, therefore, to entitle them to the balance within the three months, upon the 14th of October a full account must be sent in to the Engineer, which this is, and be approved and corrected by him. That explains what is the meaning of that document, and shows, in my judgment, if anything else is wanted, that that document is not a decision under the arbitration clause, but that it is merely sending in a detailed account and approving of its correctness in compliance with the proviso of the deed. If the certificates, therefore, as certificates, are not conclusive, the only thing that can make them conclusive is a decision under the arbitration clause of the deed; and really the struggle in the case is, and the difference of opinion in the Court arises, as to whether these certificates, and that last document which I say is not a certificate, amounts to a decision. If they do, then I agree, that if there has been a decision of the arbitrator, however erroneous it may be, the Company are bound by it. Even if there had been such a decision, I have some doubt whether this question of the extras could be so submitted to the arbitrator as to justify him in dispensing with the express provision of the deed, because it seems that by the deed the Company determined to keep the control over that provision, and therefore the arbitrator could not take upon himself to decide it. It is unnecessary to decide that, because I am of opinion that there was no decision under the arbitration clause which was binding and conclusive upon the parties.

The wording of the deed with reference to the extra works is so special, and so unusual in its stringency, that it is well to direct attention to it again. (His Lordship then read the provision as to extras) Therefore, they say, in effect, this is a matter they will not trust entirely to the Engineer; they will not be bound even by his written order; but they will keep their own control over it, and

they will take care not to be liable for extras, unless there is the order of the Engineer countersigned by the Chairman. It is said, the certificates are conclusive, you cannot go behind them. But how can it be presumed that, because the Engineer has given a certificate, the Chairman had countersigned the orders?

With regard to the question of waiver, it is an elementary principle that you cannot waive that which you do not know of. Now, it cannot be argued that up to the 16th of January, 1871, the Directors had any knowledge that for the last twelve months any extra work had been done. The certificates do not ascertain the extras, and they never saw the accounts which were sent in by the contractors to the Engineer. On that day they receive a letter, which shows that the contractors had a dispute with the Engineer, in reference to an undoubted extra—screwing the piles deeper than was shown in the drawings. There is no doubt, therefore, that that is a letter relating to extras, and calling the attention of the Company to a dispute with their Engineer. To that letter, all that the Company said was that they could not enter into a correspondence on the matter, and that copies of the contractors' letter had been sent to their Engineer, and to their solicitors, who would reply to it if necessary. Now, as I have said, to get rid of such a stringent clause as that, strong and unambiguous language is essentially necessary. Now, I do not think it is likely that the Company, having no knowledge of what extras had been done up to that time, would give a general authority to their Engineer to dispense with this special provision of the contract, and accordingly their solicitors, to whom they have referred the plaintiffs' letter of the 16th, write to the plaintiffs, and say that the Directors will require them to carry the contract into effect in all respects, and that as regards all matters of detail they must refer them to the Engineer. I do not think that this was dispensing with the countersigned order, or that, by referring the contractors as to matters of detail to the Engineer, the Directors intended to put themselves entirely into his hands, and to give him the power of dispensing with this provision in the deed, by which, up to that time, they had for their own protection kept from the Engineer the power of ordering extras without their express authority.

The only remaining question is, whether the certificates amount to a decision of the arbitrator. The clause in the deed is, in my opinion, a strict arbitration clause. It is not like a case where a man buys property or agrees to do work at a price to be fixed by a third person. (His Lordship then read the arbitration clause, and the paragraphs in the case showing that the Directors repeatedly

requested the Engineer for his observations on the account which included the extras.) Now, I do not think that the note of the Engineer, 'Approved by me,' at the foot of the account was, or was intended to be, a decision under the arbitration clause, but if it was so intended, I consider the decision null and void, inasmuch as the Engineer had express notice that the defendants wished to be heard. For these reasons I agree with my brother Grove in thinking that the judgment of the Court below is wrong.

Mr. Justice Archibald: I agree in the opinion taken by my Lord and my brother Lush, and I concur in the reasons given by my Lord. We are all agreed as to the claim for penalties. In my judgment the defendants are not entitled to succeed upon that claim. In the first place, they were in default, and in the next place, I agree that there is abundant evidence of the extension of the time.

With regard to the certificates, I think that they are made conclusive by the terms of the deed, but, if not, I agree that they have been made conclusive and binding by what has taken place.

In my experience, contracts of this description have been repeatedly altered and added to, with a view of making them more stringent upon the contractor, and the mode in which that has been done is by giving the Engineer or Architect supreme control over the contract. But if his authority is binding as against the contractor, it must of course be equally so, in those cases in which he is made absolute judge, against the parties with whom he contracts. And, in looking at the terms of this contract with regard to extras, it appears to me that we must not only endeavour to harmonise the two portions of the deed to which allusion has been made by my brother Grove, but there is another portion which must be harmonised. In the first place, we find a stringent clause, binding the contractor to obey the orders of the Engineer, and then we come to the part which relates to extras. There is a provision that the Engineer may, without in any way invalidating the contract, give directions for the performance of extra work. And then follows this clause (his Lordship read the clause referring to extras). It is said that the meaning of those two clauses taken together is that the Engineer may give orders for extra works, but that those orders must be signed by him and countersigned by the Chairman of the Company. But then there is another part of the deed to which we must give effect, which is the provision with regard to certificates. (His Lordship read the clause with regard to certificates.) Now, it is upon those certificates that the contractors are entitled to receive payment of the 85 per cent. The duty of preparing those certificates, and of ascertaining how much is to be cer-

tified for, what amount of extra work has been actually done, and whether that extra work has been done in accordance with the terms of the contract, devolves upon the Engineer, and before he can give his certificate he must of necessity form a judgment as to whether extra work has been done, and whether orders have been given to do the extra work within the terms of the contract. He may make a mistake, he may come to a wrong determination, as to whether the orders are sufficiently within the terms of the contract, but I think it is clear that he is to form an opinion on that point, and that it necessarily precedes the granting of a certificate, and without it he is not in a position to grant a certificate within the terms of the deed. Therefore, harmonising these together, although it may be that the order must be signed and countersigned, yet, when it comes to the giving the certificate, the Engineer must have decided that point before he gives it. That appears to be the *ratio decidendi* of the case of *Goodyear v the Mayor of Weymouth*,* and the Court there decided on the ground that those were matters within the competency of the Engineer to deal with, and that unless he had dealt with them, no certificate could be granted, and that having dealt with them, his decision was final.

But I also think that those certificates are conclusive on the defendants, on the ground that this dispute having arisen about the extras, the Engineer has decided and settled the matter. It is said that, with regard to that description of questions, he was in the position of an arbitrator. It appears to me that there is some misapprehension on that point. I say it with respect, but it appears to me that the Engineer stands in the position of a valuer. I do not think it can be supposed that he was to decide upon the question of extras otherwise than upon the grounds of his own skill, observation, and knowledge in those matters. It seems apart from the intention of the parties that he should summon the contractors on the one hand and the Directors on the other, and go into a regular inquiry, receiving observations from one and the other as to any dispute that might arise. Clearly, if a dispute were to arise during the progress of the work, as to whether certain things were extras, he would decide it then. When we come to the other part of the deed, spoken of as the arbitration clause, I can see no difference, because when carefully looked at it relates to precisely the same description of questions: 'If at any time during the progress or after the completion of the contract, any disputes or differences shall arise between the Company and the contractors as to the manner of executing the works, or as to the quality or quantities of the materials employed.'

* 85 L. J., C. P., 12.

How did they intend that the Engineer was to decide as to the quality of the work? Is he to decide as a skilled man, or is he to have a regular argument with the contractors on one side and the Directors on the other? It seems to me that the latter construction cannot be put upon the clause—‘or as to any charge or account, or as to any other account or thing arising out of or connected with the contract, the said disputes and differences shall be referred to and be settled by the Engineer, whose decision shall be final and binding on both parties.’ There again the Engineer would have all the matters before him, not to enter upon a regular arbitration, but to form a judgment upon the matter when there is a dispute, and to settle it according to his own skill and judgment. It seems to me that this is not a case in which the contract provides for anything in the shape of a formal arbitration, or for a formal decision. If the decision were given in effect and in substance, it would be in accordance with this part of the deed.

Then what do we find when we turn to the case to see whether there was any such decision? As long back as January 1871, the Directors had notice that extra works were designed and contemplated, that the working drawings did include extra works, and they must have been aware that the works were carried out in accordance with the working drawings. I do not dwell upon the correspondence which followed. I pass on to the two certificates for the £1,500 and the £570. When we look at that part of the case and pay attention to the dates, it seems clear there was a difference precisely of the kind that falls within the meaning of that clause which, merely for the sake of description, I call the arbitration clause, and this letter is written on the 17th of September, with a full account of all the work, amounting to more than £25,000, including extras—‘Those we hope you will find correct, or if you wish them charged in any other form we shall be glad to do so on hearing from you. We shall be much obliged if you can conveniently look into this matter as early as possible and certify for the extras.’ Then the case proceeds to state that the Engineer communicated to the defendants the amount of the plaintiffs’ account for extras. That may be ambiguous as to whether it was more than the actual sum, but the remainder of the paragraph puts it beyond doubt, for the Secretary states that he has received the bill of extras amounting to upwards of £2,000. So that the inference I should draw is, that he had the items composing those extras, and that the Directors had an opportunity of seeing what was the nature of the claim. It is then ordered that a letter be written to the Engineer, expressing the surprise of the Directors at the amount of the extras, and asking for a copy of the account

with his observations. I do not take that to mean that they had no copy of the account, but that he should make one, and append his observations to it on each item, to enable the Directors to make their observations before he decides. Now it is suggested that, this being a regular arbitration clause, the Engineer did not follow out the terms of the provision, because he did not comply with that request, and did not give the Directors an opportunity of making their observations. But the Engineer took a correct view of his duty in the matter, which was to act on his own knowledge and skill. Probably it would have been more satisfactory to the Directors if he had allowed them to make their observations, but I do not think that the fact that he proceeded without this can in any way invalidate the certificate. Then, on the 14th of October, comes a certificate that work has been done to the amount of £1,500. I understand that certificate to have been precisely in the same form as the specimen certificate in the case, which is, that the contractors are entitled to be paid that amount, and that is a decision given by him. He settles the amount in dispute, and then he gives a certificate that he has found that the contractors have completed the work satisfactorily, and the letter including the whole of their claim and a detailed account is sent in afterwards, which he goes through, alters, and returns as the final account, which of course governs the 15 per cent remaining, and he gives on the 29th of October a certificate that the balance due is the £570.

Now it appears to me that the only effect we can attribute to that is, that there having been dissatisfaction on the part of the Directors, and a question having arisen at the conclusion of the work, or during the progress of it, the Engineer decides it in the way which is pointed out to him to decide it in the contract between the parties, that is, that he should act on his own knowledge and upon the materials which were in his hands.

With regard to whether that was a waiver, I do not think it necessary to add anything to what has been said by my Lord. I concur in the view taken by my Lord and my brother Lush of the effect of the correspondence. I think that it appears from it, that the Directors referred the contractors to the Engineer, and that they (the contractors) afterwards asked him to give them properly signed orders. Although they were referred to the Engineer, they might say—'Let us have the signed orders in accordance with the contract, but in any event, if you do not do that, allow us to be assured that at the termination of the work our claims shall be taken into account,' and if the Engineer then said, 'Do not be anxious about written orders, you shall have all that you are fairly entitled to

when the time comes,' I think that in effect would be a waiver of these signatures and countersignatures. For these reasons I agree with my Lord and my brother Lush that the judgment of the Court of Exchequer should be affirmed.

Solicitors for the plaintiffs, Gregory, Rowcliffes, and Co.; solicitors for the defendants, Van Sandau and Cumming.

IN THE HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION, WESTMINSTER.

18th of November, 1875.

(Before Lord Coleridge, Chief Justice, Mr. Justice Grove, and Mr. Justice Archibald.)

*LORD BATEMAN v. THOMPSON.**

IN July 1856, the defendant covenanted to alter and add to the plaintiff's house. The materials and work were to be proper and substantial. They were to be supplied and done to the satisfaction of the plaintiff, and of his Architect, whose certificate was to be final; but it was provided that if any defect were discovered within twelve months after the giving of the certificate, the certificate was not to be a bar to any action by the plaintiff. The work was finished and the certificate was given in September 1861. More than twelve months after the certificate had been given defects appeared, and it was discovered that the materials supplied and the work done were not proper and substantial.

Held, that apart from the proviso, the plaintiff having expressed his satisfaction, and his Architect having given his certificate, the action for breach of the covenant was not maintainable, and that the intention of the parties to be gathered from the proviso was, that no action should be maintainable for any defects which might appear after the expiration of twelve months from the giving of the certificate.

Mr. H. Matthews, Q.C., and Mr. Jeune appeared for the plaintiff, Mr. Graham and Mr. Percival for the defendant.

* Mr Graham and Mr Jeune have kindly perused the proof-sheets of this report, and have authorised us to state that it is correct. It was taken from the shorthand writer's notes.

The nature of the questions raised in the action and the material parts of the contract sufficiently appear from the judgments.

Lord Coleridge, Chief Justice: In this case Lord Bateman brings an action against Mr. Thompson for breach of covenant in a deed, which was a building contract, and which included specifications supplied by his (Lord Bateman's) Architect, and I am of opinion that our judgment ought to be for the defendant.

I will shortly state what I conceive to be the facts of this case, and upon what facts I base my judgment. Lord Bateman wished to have very considerable alterations and additions done to his house in the country, and specifications were prepared by an Architect, which were submitted to the defendant on the signing of the contract, and it is upon the terms of that contract and certain findings in the case before us that I base my judgment. The contract provides that by a certain time the contractors will do all the work in a 'good, substantial, and workmanlike manner, but in every event and particular to the satisfaction of the Architect.' The contract then goes on to specify various things with regard to which the Architect is to have despotic authority over the contractor. If work is badly done in his judgment, he is to order work to be substituted for it to his satisfaction. There is provision in the contract for the appointment, either by the Architect or by Lord Bateman, of a clerk of the works, there is provision that that clerk of the works shall from time to time, and at all times that he thinks fit, go over the works and see that the orders of the Architect and the provisions of the contract are being complied with, and the decision of the Architect is in some cases to be final and conclusive, and then there is the provision to which so much attention has been directed, namely, 'that if at any time within a period of twelve months from the date of the final certificate of the Architect, that all the said works have been well and truly performed to his satisfaction, and either before or after the contractors, their executors or administrators, shall have received from the said Lord Bateman, his heirs, executors, or administrators, all or any of the sums of money hereinbefore contracted to be paid to them, it shall appear that the contractors, their executors, or administrators, have used any unsound materials in any part of the said works, or have in any other way not performed the said works according to the stipulations and true intent and meaning of those presents, in a substantial, workmanlike, and proper manner, then and in such case it shall be lawful for the said Lord Bateman, his heirs, executors, or administrators, notwithstanding anything in those presents contained or any certificate which may have been given by the Architect of the due execution of the said works, or any part

thereof, to institute any action or suit, or to take any proceedings which the said Lord Bateman, his heirs, executors, or administrators, shall think fit against the contractors, their executors, or administrators, for the damage which shall have been sustained in consequence of the use of any unsound materials by the contractors, their executors, or administrators, in the said works, or in consequence of the same or any part thereof not having been performed in a substantial, workmanlike, or proper manner, and in all other respects according to these presents, or for the recovery of any liquidated damages by those presents made payable. And it is hereby agreed that any certificate which shall have been given by the Architect as aforesaid shall not in any manner bar or prejudice any such action, suit, or other proceedings' These appear to me to be the important provisions of the deed, and under that deed the work was completed.

Now it is found in the case that there were from time to time payments made upon account according to the provisions of the deed upon the various certificates given by the Architect. It is found in the case that the whole of the works were completed. It is found that the whole sum of money was paid. And it is found that after the work was done the Architect wrote a letter to the plaintiff, in the words of the case, 'passing the work,' and also a letter to the contractors, saying, 'I have written to Lord Bateman passing the Court' It is further found that the plaintiff, that is, Lord Bateman, 'accepted the certificate of his said Architect as sufficient and satisfactory' Now, as we have power to draw inferences, I come to the conclusion, as a matter of fact, that the Architect certified to Lord Bateman his satisfaction, and that Lord Bateman accepted the Architect's certificate, and that by so doing Lord Bateman expressed his own satisfaction with the work, and that he paid for it as done according to the contract. It is also found in the case that, without going into detail, there have been improper materials used, and the photographs which have been laid before us plainly show that Lord Bateman has had put upon him an amount of work which was bad, and which ought not to have been certified as satisfactory, and which has not only put him to great expense, but must also have given him much annoyance *

The question is, whether there has been any breach of this contract, and I am of opinion that without the proviso, upon the true construction of this contract, no action lies. The contractor is to perform the work in a good, substantial, and workmanlike manner.

* In justice to the defendant, it should be stated that the principal cause of complaint had reference to the stone, which, although excellent of its sort, was not adapted for external use. It was not suggested that the work was scamped.

and with the best materials of their several kinds, and to the satisfaction of the Architect and Lord Bateman. That is to say, they are to be satisfied that they are good, substantial, and workmanlike materials and work. Lord Bateman and his Architect were so satisfied, as a matter of fact, and accordingly the covenant was in its terms performed by the defendant, and having been performed by the defendant, no action lies upon it. In my judgment the matter is clear upon the construction of the covenant, irrespective altogether of the proviso. If there could be any doubt about it, it appears to me that it is taken away by the proviso; because the proviso says, that in spite of the certificate of the Architect of the work having been well and duly performed, and in spite of the work having been certified as completed, if a gross defect is discovered within twelve months after the certificate is given 'it shall be lawful for the said Lord Bateman, his heirs, executors, or administrators, notwithstanding anything in these presents contained, or any certificate which may have been given by the Architect of the due completion of the said work or any part thereof, to institute any action or suit, or take any other proceedings which the said Lord Bateman, his heirs, executors, or administrators shall think fit against the contractors, their executors, or administrators, for the damage which shall have been sustained in consequence of the use of any unsound materials which shall have been used by the contractors, their executors, or administrators, in the said works, or in consequence of the same or any part thereof not having been performed in a substantial, workmanlike, and proper manner, and in all other respects according to these presents, or for the recovery of any liquidated damages by these presents made payable, and it is hereby agreed that any certificate which shall have been given by the Architect as aforesaid shall not in any manner bar or prejudice such action, suit, or proceeding.'

It appears to me that, as a matter of common sense and common knowledge, the true intention of the proviso is this. As I put myself into the hands of the Architect, the Architect is to certify that the work is completed, the Architect is to certify that the work is done to his satisfaction, if he does I must pay the contractor, but if within a year I find out that he has done that wrongly, then, in spite of his certificate, and in spite of my payment, I may bring my action for any damage I may have suffered by the non-compliance of the contractor with the proper sense of the contract. I do not think that the question whether or not the Architect was an arbitrator arises. This is the ordinary case of the employer having made the certificate of the Architect in certain cases binding against himself,

and still more of his having made his own expression of satisfaction in certain cases binding against himself. Having received the certificate and having expressed his satisfaction, he cannot now say that he did not receive the one, or that he did not express the other. It may seem a hard thing to say, but the answer is the answer given by Mr Justice Willes in the case of *Goodyear v The Mayor of Weymouth*,* that if you employ an Architect who does not know his business, and who certifies that he is satisfied when he ought not to express satisfaction, you must be bound by his mistake.

Now, it may seem very hard and disagreeable to the plaintiff in this case, but a man must submit to the consequences of employing a person who seems to have allowed the use of improper materials in some cases, and to have directed the use of improper materials in others. I am of opinion that the plaintiff in this action is not entitled to succeed, and that the defendant is entitled to our judgment.

Mr Justice Grove. I am of the same opinion. The two questions in this case are, whether the covenant that the contractor will, on or before a certain day, do certain work in a good, substantial, and workmanlike manner, with the best materials of their several kinds, but in every event and particular to the satisfaction of the Architect and of the said Lord Bateman, is a covenant for two things to be done by the defendant, or a covenant in which the former part is to be subject to the latter. Now, I am strongly inclined to the latter construction, namely, that the supply of the best materials on their part is to be subordinated to the satisfaction of the Architect and of Lord Bateman, and, providing after proper inspection and examination by the Architect and Lord Bateman of those materials they are satisfied, this covenant is to be taken as complied with. And even if I were to take it as a covenant for two things, not an absolute covenant, but a covenant that they will supply good materials, and also that whatever they supply shall be to the satisfaction of the Architect and of Lord Bateman, still, I think the proviso which subsequently follows, when read with the covenant, shows that these parties by this deed intended to limit any right against them to twelve months after the final certificate of the Architect that the works had been duly performed to his satisfaction. What appears to me in favour of the first construction of the covenant is, that in addition to the words, 'but in every event and particular to the satisfaction of the Architect and of Lord Bateman,' I find in the deed that there is a proviso giving considerable power of interference both to the Architect and to Lord Bateman. (His Lordship then read the proviso giving the plaintiff or his Architect power to order unsound

* 35 L. J., C P., 17.

materials or work to be removed or replaced, and to order alterations.) Now, it certainly would be a strong thing to say, that if the contractors have done work with materials of which the Architect and Lord Bateman, having power to order the removal, have expressed their satisfaction, and for which the Architect has given his certificate which is called final and conclusive, yet they shall be held to have broken their covenant if, at any time within twenty years, it should appear that those materials were unsound.

It seems to me that the construction of the proviso upon which the decision in this case mainly depends is clear. By it the parties say in effect . that notwithstanding the certificate of the Architect that all the work has been properly done, if it should appear within twelve months after the giving of such certificate that part of the work was not properly done, Lord Bateman should not be estopped, but that he should have a right of action. I think upon the true construction of this deed, taking it altogether, that after the expiration of twelve months from the giving of the Architect's certificate that the work has been completed, such certificate is final and conclusive. I therefore think that our judgment should be for the defendant.

Mr Justice Archibald . I also agree that our judgment should be for the defendant. The covenant of which the important part provides that the work is to be done in a good, substantial, and workmanlike manner, and with the best materials, goes on to specify that there are some materials to be provided by Lord Bateman, and some to be provided by the contractors, but in every event and particular they are to be to the satisfaction of the Architect and of Lord Bateman. That is what the contractors have stipulated to do. And I incline very strongly to the opinion that if that is done, and if that satisfaction is expressed in the way provided, that that is a performance of the covenant on the part of the contractor, and except for the proviso with regard to the twelve months which comes afterwards, no action would be maintainable against him. But if there were any doubt as to whether that was the true construction of the covenant, it would be entirely disposed of, it seems to me, when we look at the other portions of the deed, and the proper mode of construing a document of this kind is to look at all the provisions of it and see how they bear upon each other, and to see what light one part reflects upon the rest.

Now, with regard to the certificate, I think it is clear that the Architect is to give a certificate, not only as to the completion of the work, that is to say, when the work is finished, but that he is to be a judge of the soundness and sufficiency of the materials, and I think

the meaning of this covenant must be that if the work is done to his satisfaction and to that of Lord Bateman, that the satisfaction is expressed both with regard to the character of the materials and the workmanship, and to the fact that it has been finished and duly completed. And that being so, I think that the true view of the covenant is that when that is once done, and there is no fraud (and none is imputed here), that that is a performance of the covenant.

This view of the covenant is strongly supported by the proviso. By the deed the certificate of the Architect is made final and conclusive on the contractor. The work is to be done to the satisfaction of the Architect and of Lord Bateman, and the contractor is not at liberty to dispute or question the certificate when it is given. In that view of the case, if the covenant is performed upon the work being done and certified by the Architect, and accepted by Lord Bateman, there would be an end to every remedy against the contractor, if it were not that the parties had made a further stipulation by the proviso which says: 'It is agreed that if at any time within a period of twelve months from the date of the final certificate of the Architect that all the works have been well and duly performed it shall appear that the contractors, their executors, or administrators, have used unsound materials in any part of the said works, or have in any other way not performed the said works according to the stipulations and true intent and meaning of these presents in a substantial, workmanlike, and proper manner,' without reading the proviso in detail, if anything of that kind is discovered within the year, the covenant that the certificate shall be conclusive is qualified to this extent, that Lord Bateman is entitled to maintain an action against the contractor, and the certificate is not to operate as a bar. Now, this proviso reflects light upon the covenant. The object certainly must be to give that right of action which there otherwise would not be. Taking that view, I think it is not open to Lord Bateman to bring any action after the twelve months. Of course this does not interfere with his remedy against the Architect, and if it were possible in any other case to show that there was fraud, which is not the case here, his rights and remedies would be different, but taken as it stands here, and there being no fraud suggested, I think that there is no right of action against the contractor, and therefore that our judgment should be for the defendant *

Solicitors for the plaintiff, Norton, Rose, Norton, and Brewer; solicitors for the defendant, Clarke, Rawlins, and Clarke.

* This decision was affirmed by the Court of Appeal.

(From the *Times* of November 17, 1870.)

COURT OF EXCHEQUER, WESTMINSTER.

November 16.

(Sittings in Banco, before the Lord Chief Baron, Baron Bramwell, and Baron Pigott.)

EBDY v. M'GOWAN.

(The questions raised sufficiently appear from the judgments.)

THE Lord Chief Baron, in the course of his judgment, said that the defendant had employed the plaintiff as an Architect to build a vicarage house, and he was to act as such in relation to that building, and do the necessary work included in such employment. The plaintiff accepted the employment, and prepared plans and specifications, and solicited tenders for the work. While the work was proceeding the defendant put an end to the plaintiff's employment of Architect, and requested him to send in his account, and required that the plans and specifications might also be sent to him. The plaintiff wrote to say that he would send in his account, but would not deliver the plans, as he intended keeping them. Looking at the original contract between the parties there was no stipulation either one way or the other as to the plans, either that the defendant was to have them, or that the plaintiff should retain them. Nothing was stated about them at all except an objection to hand them over to the defendant. The only question between the parties seemed to be whether, though not expressed, it was a provision of the contract that in the event of the employment of the plaintiff being stopped by the defendant the plaintiff was entitled to retain the plans. If there was no such provision, the plaintiff had no right to retain them, if there was such a provision or stipulation, then he would have. The plaintiff gave evidence of a custom or usage among Architects that, in the event of an employment of the Architect being stopped, he was entitled to be paid for the plans and retain them. Then came the question of fact—was there any such usage as the evidence for the plaintiff said existed? His Lordship was not prepared to express an opinion on the evidence as it stood; but, supposing such a custom or usage to exist, then came the question—was it a reasonable one? He thought it was not. No such right as that set up by the plaintiff—viz. to retain the plans—existed, unless there was an express stipulation in the contract between the parties to that effect, and he

could not accept the suggestion which had been urged upon the Court on the behalf of the plaintiff that such a stipulation was, by implication, a part of the contract. It appeared contrary to reason, good sense, and justice that in the event of a contract being put an end to, the Architect should retain the plan for which he was entitled to be paid, it would require at least a clearly expressed stipulation in the contract to enable him to do so. The defendant was perfectly justified in refusing to pay until he had the plans. The execution of and the plans themselves formed the work and labour for which he charged the defendant, who was entitled to them if he had to pay for them. The rule, therefore, to reduce the verdict by the sum of £60 would be made absolute.

Baron Bramwell agreed with the Lord Chief Baron, and stated that the question could not be said to be one governing the future, because parties to contracts might make their own bargains. The real contract between the parties was that the plaintiff was to receive $2\frac{1}{2}$ per cent. for the preparation of the plans upon the estimated cost of the building, and the 3 per cent and 5 per cent. were contingent engagements after the preparation of the plans. The defendant had a right to say that he discontinued the plaintiff's employment or would stop it at the preparation of the plans. The defendant had a right to the benefit of the plaintiff's work before he paid for it. His Lordship continued that he entertained a very high opinion of Architects as a body, they were a very intelligent, high-minded, and useful body of men, and he wished to say nothing in disparagement of them, but was there such a usage as had been set up by the plaintiff, and which some Architects had sworn existed? In his Lordship's judgment the usage contended for was impossible, he could not help saying that it was perfectly suicidal, so soon as it was brought into being it cut its throat with its own absurdity. Suppose an attorney to be employed to conduct a suit, and his client deemed it expedient to put an end to the suit and his attorney's employment at the same time, and paid the attorney his costs whatever they were, had the attorney a right to say that he would not deliver up the pleas, as they might be demurred to, and he would lose the costs of opposing the demurrer? If the work be carried on to a certain point, and not further, in all common sense a man is entitled to what he is compelled to pay for. Before usage could be insisted upon it must be proved to be one well known to prevail. It required the most rigid proof that it actually existed. It was very well for some two or three gentlemen to say that there was such a usage, but he (the learned Baron) would like to see the public in the box, and hear what they had to say about it. Mr. Smirke, the Architect, had

stated there was no such usage as the plaintiff had set up. His Lordship concluded by saying that he was clearly of opinion that there was no such usage, and that the defendant was entitled to the plans. If the defendant did not get them he was paying for no benefit whatever.

Baron Pigott concurred with their Lordships, saying that, looking at the contract between the parties, the question was free from all doubt.

The rule was made absolute to reduce the verdict by a sum of £60.

Mr Digby Seymour, Q C , and Mr. Gainsford Bruce appeared for the plaintiff, Mr. Aspinall, Q.C , and Mr. John Edge for the defendant.

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